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1953

THE

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OF THE INCORPORATED COUNCIL OF LAW REPORTING

QUEEN'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

AND DECISIONS IN

THE COURT OF CRIMINAL APPEAL

◆

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OF

THE QUEEN'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE

1953

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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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Worcester County Council *v.* Worcester Union	[1897] 1 Q.B. 480	*R.*	293

STATUTES JUDICIALLY CONSIDERED

1832

Prescription Act, 1832 (2 *&* 3 *Will.* 4, *c.* 71), *ss.* 1, 4, 5 - - - - **C.A. 184**

1835

Highway Act, 1835 (5 *&* 6 *Will.* 4, *c.* 50), *s.* 91 - - - - - **C.A. 578**

1842

Tobacco Act, 1842 (5 *&* 6 *Vict.* *c.* 93), *s.* 13. **Divl.Ct. 1**

1846

Fatal Accidents Act, 1846 (9 *&* 10 *Vict.* *c.* 93), *ss.* 1, 2, 3 - - - - **C.A. 688**

1847

Harbours, Docks and Piers Clauses Act, 1847 (10 *&* 11 *Vict.* *c.* 27), *s.* 33. **Sellers J. 338**

1848

Indictable Offences Act, 1848 (11 *&* 12 *Vict.* *c.* 42), *s.* 17 - - - **Divl.Ct. 503**

Summary Jurisdiction Act, 1848 (11 *&* 12 *Vict.* *c.* 43), *s.* 11 - **Divl.Ct. 380**

—— —— *ss.* 28, 35 - - **Divl.Ct. 533**

1864

Fatal Accidents Act, 1864 (27 *&* 28 *Vict.* *c.* 95), *s.* 1 - - - **C.A. 688**

1872

Bastardy Laws Amendment Act, 1872 (35 *&* 36 *Vict.* *c.* 65) - - **Divl.Ct. 59**

—— —— *s.* 3 - - - - **Divl.Ct. 38**

—— —— *s.* 4 - - - - **Divl.Ct. 533**

Metalliferous Mines Regulation Act, 1872 (35 *&* 36 *Vict.* *c.* 77), *s.* 23 - **C.A. 167**

1875

Public Health Act, 1875 (38 *&* 39 *Vict.* *c.* 55), *s.* 265 - - - **Parker J. 511**

1876

Customs Consolidation Act, 1876 (39 *&* 40 *Vict.* *c.* 36), *s.* 186 - **Divl.Ct. 1**

1879

Summary Jurisdiction Act, 1879 (42 *&* 43 *Vict.* *c.* 49), *ss.* 5, 21 (1), 54 **Divl.Ct. 533**

—— —— *s.* 17 - - - - **Divl.Ct. 392**

1882

Married Women's Property Act, 1882 (45 *&* 46 *Vict.* *c.* 75), *s.* 12 - **C.A. 597**

—— —— *s.* 17 - - - - **C.A. 63**

1888

Railway and Canal Traffic Act, 1888 (51 *&* 52 *Vict.* *c.* 25), *s.* 17 - - **C.A. 736**

1895

Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict.* *c.* 39), *s.* 9 **Divl.Ct. 533**

1901

Humber Commercial Railway and Dock Act, 1901 (1 *Edw.* 7, *c.* ccii), *ss.* 66, 70 **Sellers J. 338**

1907

Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 5 (2) - - - - **C.C.A. 481**

1914

Criminal Justice Administration Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 58), *ss.* 3 (1), 32 (3) **Divl.Ct. 533**

1916

Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 1 (1) - - - - - **C.C.A. 660**

—— —— *s.* 43 (1) - - - **C.C.A. 489**

1918

Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Case VI, Sch. D and rule 19 of General Rules applicable to all Schedules* - - - **Pilcher J. 218**

1920

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 12 (1) (*g*), 15. **C.A. 397**

—— —— *s.* 14 (1) - - - - **C.A. 300**

—— —— *s.* 15 (1) - - - - **C.A. 23**

—— —— *s.* 15 (1) - - - - **C.A. 234**

—— —— *s.* 15 (3) - - - - **C.A. 48**

1921

Railways Act, 1921 (11 *&* 12 *Geo.* 5, *c.* 55), *s.* 26 - - - - - **C.A. 736**

1930

Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 10, *Sch.* 1 - - **Divl.Ct. 43**

—— —— *s.* 35 (1) - - - **Divl.Ct. 357**

1933

Children and Young Persons Act, 1933 (23 & 24 *Geo.* 5, *c.* 12), *ss.* 70 (1) (2), 90 (2) (3), 102 (1) - - **Divl.Ct. 553**

Pharmacy and Poisons Act, 1933 (23 & 24 *Geo.* 5, *c.* 25), *s.* 18 (1) (*a*) (iii). **C.A. 401**

Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3 (1) - **C.A. 570**

Road and Rail Traffic Act, 1933 (23 & 24 *Geo.* 5, *c.* 53), *s.* 1 (3) - **Divl.Ct. 770**

—— —— *ss.* 8, 9 - - - **Divl.Ct. 43**

Visiting Forces (British Commonwealth) Act, 1933 (23 & 24 *Geo.* 5, *c.* 6), *s.* 2 (3) (*b*) - - - - - **C.A. 459**

1934

County Courts Act, 1934 (24 & 25 *Geo.* 5, *c.* 53), *s.* 105 - - - **C.A. 408**

Road Traffic Act, 1934 (24 & 25 *Geo.* 5, *c.* 50), *Sch.* 1 - - - - **Divl.Ct. 43**

1935

Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 *Geo.* 5, *c.* 30), *ss.* 1, 5, *Sch.* - **C.A. 597**

1936

Housing Act, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 51), *ss.* 11 *and* 12 - - **C.A. 136**

—— —— *s.* 156 (1) (*e*) - - - **C.A. 565**

Public Health (London) Act, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 50), *Sch. V* **C.A. 565**

1937

Factories Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 67), *s.* 49 - - - **C.A. 328**

1939

Limitation Act, 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 2 (1) - - - - **Byrne J. 594**

—— —— *s.* 21 (1) - - - **C.A. 459**

Rent and Mortgage Interest Restrictions Act, 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3 (3). **C.A. 77**

Trading with the Enemy Act, 1939 (2 & 3 *Geo.* 6, *c.* 89), *s.* 7 - - **Devlin J. 248**

1940

Finance Act, 1940 (3 & 4 *Geo.* 6, *c.* 29), *ss.* 13, 17 - - - - **Pilcher J. 218**

1945

Building Materials and Housing Act, 1945 (9 & 10 *Geo.* 6, *c.* 20), *s.* 7 (1). **Divl.Ct. 380**

1946

Acquisition of Land (Authorisation Procedure) Act, 1946 (9 & 10 *Geo.* 6, *c.* 49), *Sch.* 1, *para.* 9 - - - - **C.A. 12**

National Health Service Act, 1946 (9 & 10 *Geo.* 6, *c.* 81), *ss.* 13, 72 **Parker J. 511**

1947

Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *ss.* 23 (3), (4), 24 (1) - - - - **Divl.Ct. 32**

Transport Act, 1947 (10 & 11 *Geo.* 6, *c.* 49), *ss.* 76, 77, 78, 79, *Sch.* 10, *para.* 5 **C.A. 736**

1948

Agricultural Holdings Act, 1948 (11 & 12 *Geo.* 6, *c.* 63), *s.* 57 - - **C.A. 361**

Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21 - - - **C.C.A. 613**

—— —— *ss.* 21 (1) (2); 22 (1) (3); 23 (1) **C.C.A. 311**

Gas Act, 1948 (11 & 12 *Geo.* 6, *c.* 67), *ss.* 14 (2), 17 (1), (5) - - **Byrne J. 594**

1949

Landlord and Tenant (Rent Control) Act, 1949 (12 & 13 *Geo.* 6, *c.* 40), *s.* 2. **C.A. 77**

Prevention of Damage by Pests Act, 1949 (12 & 13 *Geo.* 6, *c.* 55), *s.* 4 (1). **Divl.Ct. 335**

Railway and Canal Commission (Abolition) Act, 1949 (12 & 13 *Geo.* 6, *c.* 11), *s.* 8 (2) - - - - **C.A. 736**

Vehicles (Excise) Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 89), *ss.* 5, 13 *and* 27. **Divl.Ct. 8**

1950

Adoption Act, 1950 (14 *Geo.* 6, *c.* 26), *ss.* 3 (1) (*c*) *and* 6 (1) (2) - - **C.A. 117**

Maintenance Orders Act, 1950 (14 *Geo.* 6, *c.* 37), *s.* 27 (2) - - - **Divl.Ct. 59**

Shops Act, 1950 (14 *Geo.* 6, *c.* 28), *s.* 74 (1). **C.A. 318**

1951

Leasehold Property (Temporary Provisions) Act, 1951 (14 & 15 *Geo.* 6, *c.* 38), *s.* 10 (1) *and* (2); *s.* 20 - **C.A. 318**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *regs.* 2, 4, 24 (1) - - **C.A. 153**
—— —— *regs.* 3, 5, 31 (3) (*a*) (*b*). **Slade J. 617**

Control of Building Operations (*No.* 16) *Order*, 1951 (*S.I.* 1951, *No.* 1082), *art.* 3. **C.A. 454**

County Court Rules, 1936, *Ord.* 37, *r.* 2. **C.A. 408**

Defence Regulations, 1939, *No.* 56A, *Sch. VI*, *Pt. II* - - - - **C.A. 454**

Explosives in Coal Mines Order, 1934 (*made under s.* 61 *of the Coal Mines Act*, 1911) (*S.R. & O.* 1934, *No.* 6), *art.* 2 (*e*) *and* (*h*) - - - **C.A. 724**

General Regulations, 1913 (*made under s.* 86 *of the Coal Mines Act*, 1911) (*S.R. & O.* 1913, *No.* 748), *reg.* 1 - **C.A. 724**

Judges' Rules, *r.* 3 - - - **C.C.A. 680**

Metalliferous Mines General Regulations, 1938 (*S.R. & O.* 1938, *No.* 630), *para.* 7 (3) - - - - - **C.A. 167**

Motor Vehicles (*Variation of Speed Limit*) *Regulations*, 1950 (*S.I.* 1950, *No.* 1705), *r.* 2 - - - **Divl.Ct. 43**

Protection of Eyes Regulations, 1938 (*S.R. & O.* 1938, *No.* 654), *Sch.* - **C.A. 328**

R.S.C. Ord. 14 - - - - **C.A. 710**
Ord. 16, *r.* 9 - - **Pilcher J. 445**

Treaty of Peace (*Hungary*) *Order*, 1948 (*S.I.* 1948, *No.* 116), *Art.* 1 (2), (3), (5) (*g*) **Devlin J. 248**

Woodworking Machinery Regulations, 1922 (*S.R. & O.* 1922, *No.* 1196), *reg.* 10 (*b*) (i) (ii) - - - **C.A. 54**

ROYAL WARRANT JUDICIALLY CONSIDERED

Royal Warrant, 1949 (*Cmd.* 7699), *arts.* 4 (2), 5 (1) (*a*) *and* (2) - **Ormerod J. 228**

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

SAYCE *v.* COUPE.

1952
Oct. 10.

Lord Goddard C.J., Finnemore and McNair JJ.

Criminal Law—Knowingly keeping uncustomed goods—Intent to defraud—Sale of tobacco by unlicensed dealer—Purchase with knowledge of offence—Purchaser guilty of aiding and abetting—Customs Consolidation Act, 1876 (39 *&* 40 *Vict. c.* 36), *s.* 186*—Tobacco Act,* 1842 (5 *&* 6 *Vict. c.* 93), *s.* 13.

Where a person has in his possession goods which are to his knowledge uncustomed and which he intends to use or sell, he is guilty of the offence of keeping uncustomed goods with intent to defraud the Revenue of the duties thereon, contrary to s. 186 of the Customs Consolidation Act, 1876.

If one person buys from another goods which to his knowledge it is an offence for that person to sell, the buyer is aiding and abetting the vendor in the unlawful sale and is therefore guilty as a principal in the second degree.

Case stated by Oldham justices.

Two informations were preferred by the appellant, George Sayce, an officer of the Customs and Excise, against the respondent, Wilson Coupe, the licensee of the Plough Inn, Manchester Street, Oldham, alleging (1) that on December 4, 1951, he knowingly kept uncustomed goods, namely, 3,580 American cigarettes, with intent to defraud His Majesty of the duty thereon contrary to section 186 of the Customs Consolidation Act, 1876, and (2) that on November 24, 1951, he did aid, abet, counsel and procure a person unknown to sell certain tobacco, to wit 5,600 cigarettes, otherwise than as a licensed manufacturer of or dealer in or retailer of tobacco selling tobacco in his entered premises or on premises wherein he carried on the business of a licensed dealer in or retailer of tobacco contrary to section 13 of the Tobacco Act, 1842, as amended by section 8 of the Revenue Act, 1867.

The following facts were proved or admitted before the justices:—On November 24, 1951, two American soldiers in plain clothes came to the respondent's premises with one James Wood, the manager of a fish and chip shop in the same street, who was well known to the respondent and was a man of good character. The respondent was invited to buy a quantity of cigarettes in the possession of the soldiers, and eventually bought from 24 to 28 cartons each containing approximately 10 packets of 20 cigarettes, for which he paid Wood £38. The price paid of 3s. 4d. a packet was said by the soldiers to be the wholesale price of the cigarettes. The respondent was informed by one of the soldiers that similar cigarettes were on sale in all public-houses in Warrington, and that he was supplying them to a café proprietor called Sunderland. The soldier also said that the cigarettes bought by the respondent were part of an order for Sunderland which were not required by him, and that the cigarettes were honestly obtained.

On the following morning the respondent discovered that each packet of cigarettes was sealed with a label indicating that they were duty free and for the use of the United States armed forces only. On the same day the respondent told Wood that as the cigarettes were duty free they were of no use to him. Wood said that the American soldier would be back in a month's time, and that he (Wood) would take them back.

On December 4 an officer of the Customs investigation department called at the respondent's premises. The respondent, without hesitation, admitted the purchase of the cigarettes, and produced from a room upstairs 17 cartons containing 3,400 cigarettes and from behind the counter of the bar nine packets containing 180 cigarettes. Between November 24 and December 4 the respondent and his wife had smoked some of the cigarettes and had given others to his customers. At all material times the respondent had been licensed to sell tobacco and had obtained his supplies from one Ainsworth in Oldham. He was aware that Wood was not licensed to sell tobacco, but thought that the cigarettes had come through a licensed dealer, namely, Sunderland.

The justices held that the respondent, having regard to his conduct throughout, did not intend to defraud His Majesty of the duties due on the cigarettes, and they accordingly dismissed both summonses. The prosecutor appealed.

J. P. Ashworth for the appellant. The decision of the justices was wrong. They held that the respondent did not intend to defraud the Revenue of the duties payable on the cigarettes, but in their decision they confused mitigating circumstances with the question of guilt or innocence on the part of the respondent. The first question to be considered is whether the cigarettes in the respondent's hands were uncustomed. It was held in *McQueen* v. *McCann*[1] that cigarettes which were allowed to enter the country free of duty became liable to duty when they passed into the hands of an unprivileged person, which was the position of the respondent here. If a person who knows goods to be uncustomed, as the respondent did on the day following the sale to him, keeps them or gives them away, he cannot be heard to say that he did not intend to defraud the Revenue.

In *Rex* v. *Cohen*[2] it was said that in a case like the present intent to defraud was an ingredient of the offence and that such an intent must usually be inferred from the circumstances. Accordingly, if a person knew that goods were uncustomed and he had them in his possession for use or sale, it would follow that he intended to defraud the Revenue. If the respondent here had carried out his intention of returning the goods or had kept them intact, it is conceded that no intent to defraud would have been shown. But here the respondent in 10 days had "used" a large number of the cigarettes and the fact that he did not sell them makes no difference.

[LORD GODDARD C.J. I suppose the magistrates thought that if the respondent smoked the cigarettes, or gave them away, he was not committing an offence?]

To the extent that the cigarettes were smoked or given away the Revenue was in fact defrauded of the duty on them. In *Beck* v. *Binks*[3] it was said that it was an offence under section 186 of the Customs Consolidation Act, 1876, to be in any way concerned in "dealing" with uncustomed goods with intent to defraud the Revenue, and here the respondent was undoubtedly "dealing" with the cigarettes. The magistrates were not justified in drawing the inference that the respondent had no intent to defraud, and their decision on that point was perverse in the sense of being erroneous, and consequently may be reviewed by the Divisional Court: see *Bracegirdle* v. *Oxley*.[4]

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[1] 1945 S.C. (J.) 151.

[2] [1951] 1 K.B. 505.

[3] [1949] 1 K.B. 250, 252.

With regard to the second charge against the respondent of aiding and abetting Wood in making an unlawful sale, the justices appear to have thought that if the first charge against the respondent failed the second also failed. It is submitted, however, that in buying the cigarettes from Wood, who to his knowledge had no licence, the respondent was clearly aiding and abetting the seller in committing an offence under section 13 of the Tobacco Act, 1842.

F. P. R. Hinchliffe for the respondent. The decision of the justices was right. With regard to the first information, an intent to defraud must be proved, and the justices came to the conclusion that there had been no such intent on the part of the respondent. There was evidence on which they could properly so find and it was not possible to suggest that in doing so they were acting perversely. Properly regarded, *McQueen* v. *McCann*,[5] on which the appellant relied, is strongly in the respondent's favour.

With regard to the second charge, namely, that the respondent aided and abetted Wood in the making of an unlawful sale, it is submitted that the respondent was not guilty of any such offence. The provisions of section 13 of the Tobacco Act, 1842, are directed against the seller, in the present case Wood, and there is nothing in the Act which indicates that it is an offence to purchase. Further, a purchaser is not a person who aids and abets another in making a sale. If the legislature had intended that it should be an offence to purchase, as opposed to the offence of hawking or selling, it would have stated so clearly in the Act, particularly since the Act is a penal one. In *Gray* v. *Commissioners of Customs*[6] the appellant, who was a hawker of tobacco and snuff, was charged with an offence under section 13 of the Tobacco Act, but no information was laid against the purchaser. For the above reasons the justices were also right in dismissing the second information.

[4] [1947] K.B. 349, 353, 356.

[5] 1945 S.C. (J.) 151.

[6] (1884) 48 J.P. 343.

LORD GODDARD C.J. stated the nature of the charges against the respondent and continued:—The justices dismissed both the informations. We understand the reasons why they dismissed the first summons, although we do not agree with them, but we do not understand why they dismissed the second summons, to which it does not seem to the court there was any defence whatever, and in spite of Mr. Hinchliffe's argument, in which he put forward everything which could be said for the respondent, we are of opinion that the appeal must be allowed on both points. The importance of the case is this: it is well known that at the present time when large numbers of American soldiers and airmen are in this country, by an arrangement which Her Majesty's Government have made with the American Government, dutiable articles are allowed to be imported into this country for the use of the American troops without payment of duty. The result is that there are a good many sales of duty-free articles taking place surreptitiously, some, as in this case, more or less openly, with the consequence that this country loses the benefit of the customs duty payable, and that is what happened in this case. It may be that the respondent is a very respectable man, and perhaps did not realize the seriousness of what he was doing, but when the facts are considered I think it will be seen at once that only by a misdirection of themselves as to what it is necessary to prove, when people are charged with defrauding the Revenue, could the justices have come to the decision at which they arrived.

[His Lordship stated the facts and continued:] On those facts the justices found that the respondent did not intend to defraud the Revenue of the duty due on the cigarettes. It is true that the information in this case was for "keeping" the cigarettes and not dealing in them, but it is quite obvious from the way in which the case is stated and from the conclusion of the justices that the case was fought below on the sole issue that there was no intent to defraud. It seems to me there could have been no answer if the charge had been one of dealing in the cigarettes because, of course, the respondent had dealt in them by smoking them and giving them away. He was also keeping them, and the only inference one can draw is that he intended to go on doing what he was doing. It is only fair to the respondent, who seems to have been perfectly frank throughout, to say that he did not attempt to say that he was going to do anything else except that at some unspecified time he would have given any cigarettes left to the American soldiers. Why he should give them back to the

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Lord Goddard C.J.

soldiers when he had bought them from Wood, and could have demanded his money back from Wood, I do not know.

Then the justices give their reasons for coming to the conclusion that the respondent had no intent to defraud. I am not going to say that they came to a perverse decision in this case because they set out exactly their train of reasoning and the facts on which they relied, but in my opinion they misdirected themselves and misunderstood the nature of the offence and the wording of the statute. Where people are found dealing with uncustomed goods—using the word "dealing" in a general sense—and they know that the goods are uncustomed, and they are disposing of those goods or intending to dispose of them, then it follows that they are defrauding the Revenue of the duty because they know that the goods are uncustomed. They know that if they smoke uncustomed goods the duty will not be paid on them, and that therefore the Revenue is being defrauded of the duty which ought to have been paid before the goods were consumed or dealt with or kept, or harboured.

In giving the reserved judgment of the court in *Rex* v. *Cohen*,[7] in the Court of Criminal Appeal, I endeavoured to assist magistrates who have to try these customs cases either at quarter sessions or in courts of summary jurisdiction, and I there said: "Another ingredient of the offence is the intent to defraud, and "of this the jury should be reminded. But, as in all cases where "an intent to defraud is a necessary ingredient, the intent must "usually be inferred from the circumstances. If a jury are "satisfied that the accused person knew that the goods were "uncustomed, which would include a case where he has wilfully "shut his eyes to the obvious, and he had them in his possession "for use or sale, it would follow, in the absence of any other "circumstance, that he intended to defraud the Revenue." I put in ex abundanti cautela those words "in the absence of any "other circumstance" because the changes and chances of this mortal life are so manifold, and circumstances are so diverse, that it is possible to conceive of some circumstance which might afford an answer. But ordinarily speaking, if a man has uncustomed goods which he is using or intends to deal in, and knows that they are uncustomed, he is defrauding the Revenue.

I think that the justices took the view that the respondent was a very respectable publican whom they knew as a man of good character, and perhaps thought that he did not realize that he was defrauding the Revenue. That is not an answer. If people deal with uncustomed goods in the way in which the respondent dealt with them, they defraud the Revenue and that is enough. It may be that such people do not incur the same moral stigma or blame which is attached to many cases of fraud, but they defraud the Revenue if knowingly and consciously they deal with dutiable goods in such a way that the customs are deprived of the duty. Therefore, for these reasons, we shall send the first information back to the justices with an intimation that an offence was proved on the first information and that it is their duty to convict. The matter of the penalty is, of course, entirely for them, and we say nothing about it.

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[7] [1951] 1 K.B. 505.

With regard to the second information, I really do not understand why the justices dismissed the summons. They have given no reason; they simply dismissed it. The respondent, who was himself licensed to deal in tobacco, should at any rate have taken the trouble to learn what are the obligations of a man so licensed. But here was a man who had previously bought all his supplies from someone else suddenly buying large quantities of cigarettes from a man who to his knowledge was not a tobacconist and who had not a wholesale licence. It was his duty as a licensee to know the circumstances under which he could trade, and this was a sale in flat disobedience of the statute which deals with it. I do not think that the justices ought to have treated this second offence as merely a technical offence, and let it be understood that I am not saying that the first offence was a technical offence. I can understand that the justices thought that there were circumstances of considerable mitigation in the first offence and, indeed, by dismissing the charge as they did, they fell into the very common error of confusing matters of mitigation with matters of defence. In this court we are constantly having to point out to justices that, although there may be many circumstances of mitigation, that is a very different thing from saying that no offence has been committed.

The second summons charged the respondent with aiding and abetting Wood—it says a person unknown but it must have been Wood—to commit an offence under section 13 of the Tobacco Act, 1842, by buying the cigarettes from a person who to his knowledge was not a licensed dealer in tobacco, and it is quite clear that the offence charged in the second information was committed.

Mr. Hinchliffe has argued that because the statute does not make it an offence to buy, but only makes it an offence to sell,

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we ought to hold that the offence of aiding and abetting the sale ought not to be preferred or could not be preferred. It is obvious that it can be preferred. The statute does not make it an offence to buy, but obviously, on ordinary general principles of criminal law, if in such a case a person knows the circumstances and knows, therefore, that an offence is being committed and takes part in, or facilitates the commission of the offence, he is guilty as a principal in the second degree, for it is impossible to say that a person who buys does not aid and abet a sale.

For these reasons the justices ought also to have convicted on the second information.

FINNEMORE J. I agree.

MCNAIR J. I agree.

Appeal allowed.

Solicitors: *Solicitor, H.M. Customs and Excise; C. J. C. Davenport & Son, for Lees & Riches, Oldham.*

P. B. D.

1952
Oct. 21.

Lord Goddard C.J., Finnemore and McNair JJ.

JAMES *v.* DAVIES.

Road Traffic—Licensing—Land rover constructed for the carriage of goods—Goods carried on attached trailer but not in vehicle itself—"Used for the conveyance of goods"—Goods vehicle—Vehicles (Excise) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 89), *ss.* 5, 13 *and* 27.

Section 27 of the Vehicles (Excise) Act, 1949, defines a "goods vehicle" as a mechanically propelled vehicle constructed or adapted for use and used for the conveyance of goods or burden of any description.

Held, that an unladen land rover, constructed for the conveyance of goods and drawing a trailer loaded with goods, is being "used for the conveyance of goods" and is, therefore, a "goods vehicle" within the meaning of the Act.

Carrimore Six Wheelers Ld. v. *Arnold* (1949) 65 T.L.R. 506 applied.

CASE STATED by Pembrokeshire justices.

An information was preferred by the prosecutor against the defendant, David Davies, alleging that on February 29, 1952, he used on a road a land rover licensed as a private vehicle for a purpose which brought it within a class or description of vehicle to which a higher rate of duty was applicable, such higher rate of duty not having been paid, contrary to section 13 of the Vehicles (Excise) Act, 1949.[1]

At the hearing of the information the following facts were proved or admitted. On February 29, 1952, the defendant was using his land rover, which had been licensed as a private vehicle, duty having been paid at the rate of £10 a year. Attached to it was a trailer containing potato trays. The vehicle was constructed for the carriage of goods but no goods were being carried by the vehicle.

It was contended for the prosecutor that as the vehicle was constructed for the carriage of goods and was drawing a trailer loaded with goods it was a goods vehicle and accordingly liable to pay duty as such including trailer duty.

On the part of the defendant it was contended that although the land rover was constructed for the carriage of goods it was not being used for the carriage of goods; that it was not, therefore, a goods vehicle and could draw a trailer without being liable to pay trailer duty, and that it was properly licensed as a private vehicle.

The justices dismissed the information, being of the opinion that the vehicle was not a goods vehicle as although it was constructed for the conveyance of goods it was not being used for that purpose. They considered that a trailer was not part of a vehicle so as to bring it within the definition of "goods vehicle" in section 27 of the Act of 1949 and that the vehicle was, accordingly, properly licensed as a private vehicle.

The prosecutor appealed.

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[1] Vehicles (Excise) Act, 1949, s. 5 (1): "Subject to the provisions "of this Act, the duty chargeable in "respect of a goods vehicle . . . shall ". . . be at the rate specified . . . "in the fourth and fifth columns of" Part I of the Fourth Schedule to the Act.

S. 13 (1): "Subject to the pro-"visions of this section, where a "licence has been taken out in "respect of a mechanically propelled "vehicle at any rate under this Act "and the vehicle is at any time while "the licence is in force used . . . in "a manner or for a purpose which "brings it within . . . a class or "description of vehicle to which a "higher rate of duty is applicable "under this Act, duty at that higher "rate shall become chargeable in "respect of the licence for the "vehicle. . . ."

S. 27: "'goods vehicle' means "a mechanically propelled vehicle ". . . constructed or adapted for use "and used for the conveyance of "goods or burden of any description, "whether in the course of trade or "otherwise."

J. P. Ashworth for the prosecutor. On the authority of *Carrimore Six Wheelers Ld.* v. *Arnold*,[2] which, it is submitted, governs the present case, the land rover in question, which was admittedly constructed for the conveyance of goods, was on the facts found by the justices being used for the conveyance of goods as it was drawing a loaded trailer, and it is therefore a goods vehicle. Section 5 (1) of the Vehicles (Excise) Act, 1949, specifies the duty which is chargeable on a goods vehicle, and section 5 (2) provides that a goods vehicle drawing a trailer shall be subject to an additional duty in respect of the trailer. Section 13 of the Act prescribes the penalty to be imposed where a vehicle licensed at one rate of duty is used for a purpose which brings it within a class or description of vehicle to which a higher rate of duty is applicable and such higher rate of duty has not been paid. The definition of a " goods vehicle " in section 27 of the Act is a " vehicle . . . constructed or adapted for use and " used for the conveyance of goods . . . of any description "; and the question which this case raises is whether a vehicle constructed for the conveyance of goods is " used for the conveyance of goods " if it is itself unladen but draws a trailer loaded with goods. In *Carrimore Six Wheelers Ld.* v. *Arnold*,[2] which concludes this case, the court considered what amounted to a carriage or conveyance of goods and decided, in circumstances in pari materia with those now in question, that " carry " and " convey " were interchangeable terms, and that goods were being " conveyed " by a tractor which was towing a trailer on which a similar trailer was laden. [*Hubbard* v. *Messenger*[3] referred to.]

Skelhorn for the defendant. *Carrimore Six Wheelers Ld.* v. *Arnold*[4] is distinguishable from the present case as it was concerned with different statutory provisions, and should not be treated as deciding the meaning of " goods vehicle " in the Vehicles (Excise) Act, 1949. In the *Carrimore* case[4] the vehicle was being operated under a limited trade licence and there was no necessity to look first at the construction of the vehicle, as must be done in the present case. A land rover is constructed for the carriage of goods, but can quite properly be licensed as a private vehicle so long as it is not in fact used for the conveyance of goods; and the fact that such a vehicle draws a loaded trailer does not make it a goods vehicle within the definition of section 27 if it is not a goods vehicle without the presence of a trailer.

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[2] (1949) 65 T.L.R. 506.

[3] [1938] 1 K.B. 300.

[4] 65 T.L.R. 506.

Section 27 is capable of two different interpretations, and accordingly, since the Act of 1949 is a tax Act, it should be given the interpretation which is more favourable to the subject: see *Clifford* v. *Commissioners of Inland Revenue*, *per* Pollock B.,[5] and *Partington* v. *Attorney-General*,[6] *per* Lord Cairns.[7]

LORD GODDARD C.J. This is a case stated by Pembrokeshire justices before whom the defendant was summoned for (to put it compendiously) using a vehicle which was alleged to be a goods vehicle for the conveyance of goods, he not having paid the higher rate of duty chargeable in respect of a goods vehicle.

The vehicle in question was one of those vehicles quite familiar nowadays known as a land rover. The justices found that attached to the vehicle on the day in question was a trailer containing potato trays; that the vehicle was constructed for the carriage of goods but no goods were being carried by the vehicle and that it was licensed only as a private vehicle. The justices were of opinion—and it was not an easy question at all—that the vehicle was not a goods vehicle although it was constructed for the conveyance of goods because there was no evidence that it was being used for the conveyance of goods. That really neatly raises the question: what is meant by "the conveyance of "goods"?

In my opinion this case is really concluded by the decision in *Carrimore Six-Wheelers Ld.* v. *Arnold*,[8] because although that was under a different regulation the ratio decidendi of the case was that, for similar purposes to these, "carry" and "convey" are really interchangeable terms.

The definition of "goods vehicle" under the Vehicles (Excise) Act, 1949, is "a mechanically propelled vehicle (including a "tricycle weighing more than eight hundredweight unladen) "constructed or adapted for use and used for the conveyance "of goods or burden of any description, whether in the course "of trade or otherwise."

The justices found that the vehicle was constructed for the carriage of goods. Was it then being used for the conveyance of goods? If it was being used to convey goods from one place to another it seems to me not to matter in the least whether the

[5] [1896] 2 Q.B. 187, 193.
[6] (1869) L.R. 4 H.L. 100.
[7] Ibid. 122.
[8] 65 T.L.R. 506.

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goods were laden on the vehicle itself or laden in a trailer which the vehicle was drawing. As I pointed out in the course of the argument, if the view which commended itself to the justices were right it would follow that furniture removers could move furniture in great pantechnicon trailers, and if they drew such trailers by a vehicle which, though constructed to carry goods, had no furniture in it, it could be said that they were not liable to pay the heavier rate of duty for goods vehicles.

I think that once a mechanically propelled vehicle is conveying goods, although it conveys them by means of a trailer, the question becomes easy. This land rover was adapted for that use and was being used for the conveying of goods or burden because it was moving potato trays from one place to another.

Accordingly, I think that this case must go back to the justices with an intimation that the case was proved.

FINNEMORE J. I agree.

McNAIR J. I agree.

Appeal allowed.

Solicitors: *Treasury Solicitor; A. J. A. Hanhart.*

S. C.

C. A.

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Oct. 3, 6.

Somervell, Jenkins and Hodson L.JJ.

MIDDLESEX COUNTY COUNCIL *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT AND OTHERS.

Local Government—Town and Country Planning—Compulsory purchase of land—Objection within prescribed time by local authority when not owner—Subsequent purchase by objecting local authority after time for objecting has elapsed but before public local inquiry—"Land which is the property of a local authority"—Whether requirement that compulsory purchase order to be subjected to parliamentary procedure applicable—Acquisition of Land (Authorisation Procedure) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 49), *Sch.* 1, *para.* 9.

By para. 9 (in Part III) of Sch. 1 to the Acquisition of Land (Authorisation Procedure) Act, 1946: "A compulsory purchase "order shall, in so far as it authorises the compulsory purchase "of land which is the property of a local authority, . . . be subject "to special parliamentary procedure in any case where an objection "to the order has been duly made by the local authority . . . and "has not been withdrawn."

A borough council made an order for the compulsory purchase of land which they desired to acquire for a cemetery. At a later date a county council made an order for the compulsory purchase of park land which included the land which the borough council wished to acquire. During the period of time specified for the making of objections the county council made an objection to the order of the borough council. A joint public local inquiry was ordered by the Minister, but two days before the opening of the inquiry the county council by an agreement under seal bought the whole of the land, and withdrew their submission for confirmation to the Minister of their own purchase order. The inquiry therefore was concerned only with the borough council's order, it being contended for the county council that as the land in question belonged to a local authority the Minister had no jurisdiction to confirm the order, but it must be subjected to special parliamentary procedure in accordance with para. 9. The Minister overruled that submission, and confirmed the order. On appeal by the county council Ormerod J. allowed the appeal and quashed the order. The Minister and the borough council now appealed.

Held, that the words "duly made" in para. 9 mean made within the time specified for the making of objections, and that as at that time, when the county council made their objection, they were not the owners of the land para. 9 was not applicable and the Minister had jurisdiction to confirm the order.

Decision of Ormerod J. reversed.

Quaere. Whether the special parliamentary procedure only applies when the objecting local authority is owner of the land at the time when the original compulsory purchase order is made or whether it applies if that local authority becomes owner at any date before the period for objecting has expired.

Marriott v. *Minister of Health* [1937] 1 K.B. 128 distinguished.

APPEAL from Ormerod J.

On January 21, 1949, an order was made by the Islington Borough Council for the compulsory acquisition of 123 acres of Trent Park for the purpose of a cemetery, which order was duly submitted to the Minister of Health for confirmation in accordance with the Acquisition of Land (Authorisation Procedure) Act, 1946. On May 23 and July 6, 1949, the Middlesex County Council made orders for the compulsory purchase of the whole of the land comprising Trent Park, including the 123 acres comprised in the borough council's order. The three orders were duly advertised. Objections were made to the borough council's order by the county council and others, and objection to the county council's orders was made by the borough council. A joint inquiry was ordered by the Minister, an inspector was appointed to hold it, and he did so from November 9, 1949, to December 2, 1949.

On November 7, 1949, the county council entered into an agreement under seal with the owner of Trent Park, Mrs. Gubbay, to purchase the whole of the land comprised in the orders, and thereby became the owners of the land. They therefore on the first day of the inquiry withdrew their submission for confirmation of their orders and the inquiry proceeded into the borough council's order and the objections to it.

It was submitted on behalf of the county council at the inquiry that the land, the subject of the order, was the property of a local authority, namely, the county council, who had objected to the order and had not withdrawn their objection, and that the order was therefore subject to special parliamentary procedure in accordance with paragraph 9 (in Part III) of Sch. 1 to the Act of 1946.[1]

On March 15, 1950, the county council received a copy of a letter written by the Minister of Health to the borough council in which he stated that he did not intend to lay their order before Parliament. On April 18, 1950, the Minister confirmed the order of the borough council and published the confirmation.

The Middlesex County Council appealed.

The appeal came before Ormerod J. on July 27, 1951, and was allowed. The judge said it had been argued that as at the time of giving notice of objection to the borough council's order the Middlesex County Council were not the owners of the land in question they had not made an effective objection within the meaning of Sch. 1 to the Act of 1946, or one which would entitle them to the benefit of paragraph 9 (Part III) of that schedule. To take that view of the provisions of the schedule would be straining unnecessarily the meaning of the words in paragraph 9: "where an objection to the order has been duly made by the "local authority . . . and has not been withdrawn." The compulsory order must be quashed and the matter must be the subject of special parliamentary procedure as laid down in paragraph 9.

The Minister [now the Minister of Housing and Local Government] and the Islington Borough Council now appealed, contending that inasmuch as the notice of objection given by the county council within the time specified for giving such notices was not given as owners of the land the Minister was under no obligation to lay the order on the table of Parliament, but had jurisdiction to confirm it.

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[1] Acquisition of Land (Authorisation Procedure) Act, 1946, Sch. 1, Part III, para. 9: "A compulsory "purchase order shall, in so far as it "authorises the compulsory purchase "of land which is the property of a "local authority, . . . be subject to "special parliamentary procedure in "any case where an objection to the "order has been duly made by the "local authority . . . and has not "been withdrawn."

Michael Rowe Q.C., *G. D. Squibb* and *W. J. Glover* for the Islington Borough Council. The schedule, having laid down the procedure generally to be followed in regard to orders for compulsory purchase of land, then by paragraph 9 deals specifically with land owned by a local authority and provides that the order for compulsory purchase shall be subject to special parliamentary procedure. The county council made objection to the order of the borough council, but not as owners of the land. The words "duly made" in paragraph 9 mean that objections must be made within the time specified for making objections, and the county council did not become owners of the land until months after the closing of the time for making objections. To come within paragraph 9 notice of objection must be given by a local authority as "owner," and it must be given within the time specified. Notice in any other capacity is irrelevant. The learned judge, applying the principle laid down in *Marriott* v. *Minister of Health*,[2] held that the Minister was entitled to have regard to the circumstances existing at the date of the public local inquiry and not to those existing at the date of the order. That case was distinguishable from the present case. It depended on the provisions of the Housing Act, and the court had not laid down any general principle.

Sir Lynn Ungoed-Thomas Q.C. and *J. P. Ashworth* for the Minister of Housing and Local Government. There is no analogy between this case and *Marriott's* case.[2] In the latter case the raison d'etre for the exercise of the discretion had gone. In the present case the question is whether a special provision made by the statute is applicable, or the ordinary confirmatory procedure should be followed. Paragraph 9 contains two requirements: (1) property owned by a local authority; (2) objection duly made by the local authority as owner and not withdrawn. The question for decision is whether those two requirements should be synchronized. The natural interpretation of the paragraph is that a local authority, in order to have the benefit of special parliamentary procedure, must have been the owner of the land, and made objection in that capacity, before the time for making objection has expired.

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[2] [1937] 1 K.B. 128.

Harold Williams Q.C. and *Ramsay Willis* for the Middlesex County Council. The learned judge came to the right decision, and for the reasons which he gave in his judgment. The foundation of the case presented by the county council is that this is a question of jurisdiction.

[SOMERVELL L.J. Up to what date do you say ownership may be acquired?]

At least up to the date when the Minister confirms. A local authority can claim the benefit of the special parliamentary procedure up to that date. It is a matter of jurisdiction, and if it is it cannot matter whether the Minister knows of the local authority's ownership. There are no words in the Act which limit the date at which ownership is material, and there is nothing in paragraph 9 which excludes a local authority from becoming the owner of the land as late as the date of the inquiry and arguing then that the Minister cannot confirm the order. Should it become known to the Minister at or after a public inquiry that the land proposed to be acquired is owned by a local authority his jurisdiction to confirm is gone. *Marriott's* case [3] was decided under a different statute, and the circumstances differ from those in this case, but there is no major difference in principle between the two cases. It is not desired to go so far as the learned judge in saying that words have to be read into the Act of 1946, but it is submitted that to succeed the appellants must find in the Act words which would justify the Minister in the action which he has taken in confirming the order.

SOMERVELL L.J. This is an appeal from a decision of Ormerod J. which raises a point of construction under the Acquisition of Land (Authorisation Procedure) Act, 1946. The Minister confirmed an order made by the Islington Borough Council, the appellants in this court, and very shortly the question is whether he had jurisdiction to do that, or whether, under the Act, that order ought to have been dealt with by special parliamentary procedure, it admittedly not having been subjected to that procedure. Ormerod J. held that in the events that had happened the Minister had no jurisdiction to confirm the order, and if that be correct it is agreed that the matter must start de novo and go through the special parliamentary procedure.

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[3] [1937] 1 K.B. 128.

[His Lordship stated the facts, which were not in dispute, and continued:] Section 1 of the Act, leaving out unnecessary matters, provides that the authorization of any compulsory purchase of land by a local authority "shall, subject to the "provisions of this and the next following section, be conferred "by an order . . . in accordance with the provisions of the First "Schedule to this Act." Subsection (2), again leaving out irrelevant words, says: "The purchase, in a case falling within "the last foregoing subsection, of land (*a*) which is the property "of a local authority . . . shall be subject to the special pro-"visions of Part III of the said First Schedule." Section 2 deals with the power of speedy acquisition which the appellants relied on before us.

The point is a short one of construction, depending on one particular paragraph of Sch. I, but I think it is right that I should refer briefly to the earlier paragraphs, partly because they indicate the general nature of the procedure and also because they were, to some extent, relied on by counsel on both sides. Paragraph 1 of Part I provides that: "A compulsory "purchase order authorising a compulsory purchase by a local "authority . . . in a case falling within subsection (1) of section 1 "of this Act shall be made by the local authority and submitted "to and confirmed by the authority having power under the "enactment in question to authorise the purchase (hereafter in "this Schedule referred to as the 'confirming authority') in "accordance with the following provisions. . . ." I think I can summarize the earlier part of paragraph 3 (1) (*a*), which provides for publication in local newspapers and advertisements of various details and also provides that what is published must specify the time, not being less than 21 days from the first publication of the notice, within which and the manner in which objections to the order can be made. Paragraph 3 (1) (*a*) (and again I can summarize) provides that unless a special direction is given, notice is to be served on every owner, lessee and occupier, except tenants for a month or any period less than a month, of land comprised in the order. Those notices also have to specify the time for objection, which must be not less than 21 days from the service.

Paragraph 4 was a good deal discussed in argument and there may be difficult points of construction, some of which are not, in my view, necessary for decision so far as this case is concerned. Paragraph 4 (1) provides: "If no objection is duly

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"made by any such owner, lessee or occupier as aforesaid or if "all objections so made are withdrawn, the confirming authority, "upon being satisfied that the proper notices have been published "and served, may, if the authority thinks fit, confirm the order "with or without modifications." It seems to me reasonably plain that that subsection is dealing with objections by owners, lessees or occupiers, and not with objections from other people. I think it is sufficient for the present decision to note that under these earlier paragraphs objections by owners, lessees or occupiers are specially dealt with and for certain purposes come into a category which, for the purposes of this section, has a greater effect in certain circumstances than objections of another kind.

In my view, this appeal turns on the provisions of Part III, namely, the special provisions as to the descriptions of land dealt with in section 1 (2) of the Act, the relevant parts of which I have read. The words which we have to construe, omitting irrelevant words, are to be found, in my opinion, in paragraph 9.

[His Lordship read the paragraph and continued:] As I have said, the Middlesex County Council objected to this order, but they were not at that time the owners of the land. Their objection, therefore, was not an objection by them as owners. They only became owners on November 7, some months after the time for submitting objections had expired.

The first point on which I wish to express an opinion is that in my view the words "duly made" in paragraph 9 mean "made within the time fixed." They may mean other things, the prescribed form and so on, if there is one, but they undoubtedly, in my opinion, mean that. In the present case the learned judge held that the Middlesex County Council, having objected at a time when they were not owners, had fulfilled the words which I have read in paragraph 9 and were entitled to say that an objection to the order had been duly made by the local authority within the meaning of that paragraph. I do not think that is, with respect, the proper construction of the paragraph. I think it means that the objection to the order which is to be duly made must be made by the local authority as owner of the land which it is sought to purchase. As no such objection was ever made by the Middlesex County Council within the time limited, I do not think that the special parliamentary procedure became applicable to this order.

That perhaps would be sufficient to dispose of the case, but I would like to add one or two other observations. Mr. Williams rightly submitted for the Middlesex County Council that this was a matter of jurisdiction. I quite agree, and the only question is in what circumstances has the Minister jurisdiction to confirm without subjecting the order to special parliamentary procedure. I would also like to say that I do not think there is anything surprising in the result for which the Minister and the borough council contend. It might well be that a distinction is logically drawn between the case in which a local authority is the owner at the time when the original order is made or possibly becomes owner before the time for objection expires, and the case in which it becomes owner at a later date. That is a distinction which, I think, is drawn by this paragraph and it does not surprise me.

The other matter which does not arise in this case is whether the special procedure applies only when the local authority is owner at the time of the original order or applies if the local authority becomes owner at any date before the period for objection has expired. I propose to leave that point open. I may be inclined to one view or the other about it, but I think it is much better to leave it open in case it does arise and it is desired to argue it.

The only other matter to which I will refer is the case of *Marriott* v. *Minister of Health.*[4] That was a case where an order was made under the Housing Act of 1930, and at the time when the order was originally made by the local authority there were on the area dwelling-houses which had been condemned as unfit for human habitation and which the owners had been required to clear, but had not at that time cleared. By the time the public inquiry was held the buildings had been demolished, and that was made known to the inspector. This court, affirming the judgment of Swift J., held that, having regard to the provisions of that Act, the condition of affairs at the date of the public inquiry was not only relevant, but must be taken into account by the Minister; and taking them into account the order ought not to have been confirmed. I do not think that that decision, on different words in a different Act, dealing with a different subject-matter, assists us in this case, and it certainly cannot affect the construction which, if I am right, is the correct construction of paragraph 9 of the Schedule. The only question we have to decide is whether, the Middlesex County Council having become owners on November 7, the special parliamentary procedure became applicable to the order. For the reasons that

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[4] [1937] 1 K.B. 128.

I have given I think it did not, and therefore I would allow the appeal.

JENKINS L.J. I agree, and there is really very little I can usefully add; but as we are differing from the learned judge I feel I should state my own reasons for doing so. It will be remembered that the dates were these: the Islington Borough Council's compulsory purchase order was dated January 21, 1949, and that was subject to confirmation by the Minister of Health. The objection by the Middlesex County Council was made on February 22, 1949, and at that time the Middlesex County Council did not own the land proposed to be acquired or any part of it. The time under the statutory provisions and notices served or advertised in pursuance thereof within which any objection had to be made expired on February 25, 1949. On November 7, 1949, the Middlesex County Council, having in the meantime served its own compulsory purchase orders extending together to the whole of the Trent Park property, entered into an agreement for the purchase of the entire property by private treaty from Mrs. Gubbay, the then tenant for life. The public local inquiry was held on November 9–14 and on December 2. On April 18, 1950, the Minister of Health confirmed the Islington Borough Council's order, I think as to part only of the land originally claimed.

The question in this case is whether on those facts the Middlesex County Council's ownership of the land under the agreement with Mrs. Gubbay, although that ownership was only acquired on November 7, 1949, whereas the last date for objection to the Islington Borough Council's order was February 25, 1949, had the effect of making the last-mentioned order subject to special parliamentary procedure under the provisions of section 1 (2) of, and Part III of Sch. I to, the Acquisition of Land (Authorisation Procedure) Act, 1946, relating to the compulsory purchase of land which is the property of a local authority.

[His Lordship read the material sections of the Act and of Sch. I thereto, and continued:] Paragraph 9 does not say that so far as land belonging to a local authority is concerned the compulsory purchase order shall be subject to parliamentary procedure unless the local authority consents to the purchase, or anything of that kind. The ownership of land by a local authority only necessitates special parliamentary procedure if the conditions set out in paragraph 9 are observed. What are those conditions upon the true construction of the paragraph? It begins by referring to the compulsory purchase order. It says that such order, in so far as it authorizes the compulsory purchase of land of the relevant description, shall be subject to special parliamentary procedure in certain cases. Going back to paragraph 1 of the first Part of the Schedule, one observes that "a compulsory purchase order authorising a compulsory purchase by a local authority . . . shall be made by the "local authority and submitted to and confirmed by" (in this case) the Minister of Health.

Bearing that in mind, it seems to me that the reference at the beginning of paragraph 9 to a compulsory purchase order, in so far as it authorizes a compulsory purchase of land, and so on, is a reference to the order as made by the acquiring local authority. It clearly cannot be a reference to the order as confirmed by the Minister, for ex hypothesi where special parliamentary procedure is necessary there can be no question of confirmation by the Minister. In such a case the special parliamentary procedure has to be carried out and appropriate provisions are contained in the relevant Act of 1945 as to the method of bringing the order into operation after that special procedure has been complied with. Attention is thus directed to the point of time at which the local authority has made an order authorizing the compulsory purchase of land. At that point of time, the order, in a case where no property of any of the special descriptions mentioned in subsection (2) of section 1 is in question, is subject to confirmation by the Minister in accordance with the ordinary procedure.

Paragraph 9 is dealing at the same point of time with cases where something else may be required, namely, the special parliamentary procedure. The order is to be subject to that procedure if two conditions are fulfilled and not otherwise. The first condition, so far as material to the immediate case, is that the land should be the property of a local authority. The second condition is that objection to the order shall have been "duly made" by the local authority and not withdrawn. It seems to me that (subject to the possibility of subsequent withdrawal of any objection duly made) the language of paragraph 9 makes it reasonably clear that the latest date for considering the matter and seeing whether those two essential conditions exist, and accordingly whether the special parliamentary procedure is required or not, is the date immediately following the expiration of the period within which objections, if any, must be made.

Considering the situation as at that date, the Minister (in effect) has to ask himself: "Is this order an order for the compulsory purchase of any land belonging to a local authority? "If so, has that local authority duly objected?" If it is found, when those questions are asked, as at that date, that none of the land comprised in the compulsory purchase order is the property of a local authority, it seems to me necessarily to follow that no case for special parliamentary procedure has arisen or can thereafter arise; for if the local authority is not the owner of any of the land, it cannot object in any relevant sense, and if it becomes for the first time owner of some of the land after the time allowed for making objections has expired, no objection that it then makes as owner can be "duly made." I think it is really plain in the context that the objection referred to in paragraph 9 must be an objection by the local authority as owner of some part of the land, and that any objection that it may make otherwise than as such owner is nihil ad rem for the purposes of that paragraph. If, when reviewing the situation as at the date immediately following the period within which objections are to be made, one finds that some local authority, not being the owner of any part of the land, has, otherwise than as owner, made an objection of some kind, that does not, in my view, affect the matter at all.

The opposite construction involves, to my mind, the very odd conclusion that if within the time prescribed for making objections a local authority chooses to make some objection or other, not at that time having any interest in the land, then the question whether special parliamentary procedure will be necessary or not is left at large, I know not for how long, because possibly that local authority, having already objected on quite different grounds, may fulfil the other condition of paragraph 9 by becoming the owner of the land. That is a construction of paragraph 9 which I am unable to accept, and I think it is reasonably plain that what is necessary under that paragraph is that a local authority should be the owner of some of the land concerned, and as owner should have made an objection within due time and not withdrawn its objection.

I have only to add that it seems to me that *Marriott* v. *Minister of Health*,[5] on which the judge, to some extent, founded himself, is really directed to a different point. The point there was that in the event which happened the area to which the compulsory purchase order related had been so dealt with that at the time when the confirmation of the order was under consideration it had ceased to be a clearance area, so that the statutory foundation for the proposed compulsory acquisition could be said to be gone. There is nothing of that sort in the present case. The position here is simply that in certain circumstances land of a particular description, namely, land owned by a local authority, can only be acquired compulsorily through the medium of the special parliamentary procedure; and the question is whether on the true construction of the relevant provisions of the Act of 1946 the circumstances of the present case were, in the events which happened, such as to bring the special parliamentary procedure into play.

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[5] [1937] 1 K.B. 128.

For the reasons given by my Lord, and those which I have endeavoured to express, I consider that this question should be answered in the negative, and that the appeal should accordingly succeed.

HODSON L.J. I agree that the appeal should be allowed, and have nothing to add.

Appeal allowed.
Leave to appeal to House of Lords refused.

Solicitors: *H. Dixon Clark, Town Clerk, Islington; Solicitor, Ministry of Health; C. W. Radcliffe.*

A. W. G.

CROWHURST *v.* MAIDMENT.

[Plaint No. H. 1014.]

C. A.
1952
Oct. 21.

Evershed M.R., Romer L.J. and Harman J.

Landlord and Tenant—Contractual tenant of house—Subletting of upper floors—No intention to resume possession—End of contractual tenancy—Statutory tenancy—Landlord's claim to order for possession of upper floors—Granted against defendant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15 (1).

In 1938 the plaintiff purchased a house then let to the defendant who was occupying the ground floor only, having sublet the two upper floors as separate residences although nothing had been done to divide them up and convert them into separate flats. During 1951 the defendant's contractual tenancy came to an end and he had become a statutory tenant.

The plaintiff claimed as against the defendant an order for possession of the two upper floors of which he had admittedly no intention of resuming occupation.

Held, that the plaintiff was, having regard to section 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, entitled to the order for possession; and that this was so although the two floors were not divided into separate flats, the order being made without prejudice to the subtenants.

Skinner v. *Geary* [1931] 2 K.B. 546; *Barrell* v. *Fordree* [1932] A.C. 676 and *Murgatroyd* v. *Tresarden* [1947] K.B. 316, applied.

APPEAL from Judge Bensley Wells sitting at Marylebone county court.

In 1938, the plaintiff, Miss F. A. Crowhurst, purchased the reversion of 141 Saltram Crescent, Maida Vale, of which the defendant was the contractual tenant. He lived on the ground floor and had sublet the first and second floors to other persons. These floors had not been reconstructed so as to convert them into separate self-contained flats.

During 1951 the defendant's contractual tenancy came to an end and he had become a statutory tenant under the Rent Restriction Acts. The plaintiff afterwards brought proceedings for possession of the first and second floors so far as the defendant was concerned, who had no intention of residing there again. The county court judge refused to make the order asked for. The plaintiff appealed.

Heathcote-Williams Q.C. and *D. J. Hyamson* for the plaintiff. The claim is that there should be an order against the defendant of possession of the two upper floors, but not against the subtenants, who are not parties to these proceedings.

[EVERSHED M.R. Would the proper order be that the defendant no longer had the benefit of the Rent Restriction Acts in regard to those floors?]

There should be an order for possession: see *Skinner* v. *Geary* [1] and the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1). It must be realized that the defendant never had any intention to reoccupy the floors sublet. This case is really within *Murgatroyd* v. *Tresarden*,[2] except that in that case there had been a sub-division into self-contained flats. The county court judge treated the case as having no application. In this he was mistaken. It is sufficient to say that the floors are separate dwellings: see *Barrell* v. *Fordree*,[3] affirming the decision in the same case reported as *Fordree* v. *Barrell*,[4] where, however, the sublettings had been for business.

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[1] [1931] 2 K.B. 546.

[2] [1947] K.B. 316.

David Wild for the defendant. It is true that the defendant has never occupied the upper floors, but the whole house was let to him under the contract of tenancy. It follows that the defendant is entitled to the benefit of the Rent Restriction Acts as to the whole. *Skinner* v. *Geary*[5] has no application.

[EVERSHED M.R. What difference does it make that the defendant was tenant of the whole house if he sublet part of the house?]

The defendant as statutory tenant is not within the Rent and Mortgage Interest (Restrictions) Act, 1933, Sch. I, para. (*d*), if he sublet the same part of the premises but retained the ground floor. Why then should his right as statutory tenant of the two upper floors be taken away from him? *Murgatroyd* v. *Tresarden*[6] is completely distinguishable. It made all the difference that the subletting there was of separate flats. Here nothing had been done to the upper floors to make them into separate flats.

No reply was called for.

EVERSHED M.R. This appeal has raised a point of some little nicety, and I can well understand the principle which underlies Mr. David Wild's argument. We are not supplied with any very full statement of the facts, and still less of the judge's reasons for his judgment. [His Lordship stated the facts.]

It is conceded before us, first that the defendant has never at any material time occupied any part of the two upper floors, having at all material times sublet them, and secondly that he has no intention of ever again residing in any part of either floor. When the contract subsisted the defendant granted, as he was entitled and able to grant, the right of exclusive possession of those two upper floors to the persons to whom he sublet them. But it is no doubt the fact, although we have no very precise evidence, that the top and first floor could not be described as self-contained flats in the sense in which that phrase is applied to flats in a block of flats where each flat has its own front door. The only other fact that I should mention is that, at a date which is alleged in the pleading to be about a year ago, the contractual tenancy came to an end, and the defendant became a statutory tenant and entitled to rely on the provisions of the Rent Acts—at any rate in respect of such part of the premises as he personally occupied.

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[3] [1932] A.C. 676.
[4] [1931] 2 K.B. 257.
[5] [1931] 2 K.B. 546.
[6] [1947] K.B. 316.

This proceeding, however, relates only to the first and top floor, and the question is: Can the defendant—not his subtenants, who are not parties before the court—assert the Rent Acts to defeat the plaintiff's claim in respect of them? I can well understand the logic of Mr. David Wild's argument, based as it is on section 15 (1) of the Act of 1920. That subsection provides, among other things, that a tenant is entitled to the protection of the Act so long as he remains in possession, and that under the statutory tenancy such of the terms of the original contract as are consistent with the provisions of the Act continue to apply. Mr. David Wild says that during the contract the defendant was entitled to sublet any part of this house for residential, and indeed for any, purposes, and that that right persists after the termination of the contract, subject only to this qualification, that by what is now paragraph (*d*) of Sch. I to the Act of 1933, a statutory tenant, who without the consent of his landlord lets the entire premises, or having let some part lets the remainder, then creates in the landlord a right to go to the court and ask for an order for possession of the whole.

On those references alone there is plainly much force in Mr. David Wild's submission that the defendant, not having brought himself within paragraph (*d*), is entitled as statutory tenant to enjoy the same subject-matter as he enjoyed when a contractual tenant. But, whatever the strength of that argument, I think it has been too severely cut into by decisions which proceed on another principle, inherent in the Acts, which is that their purpose was to protect occupants in the occupation of their homes and no more. In *Skinner* v. *Geary*[7] Scrutton L.J. really construed (as I think) the vital words "so long as he retains possession" in section 15 (1), and said that a person who was found not to occupy any part of the subject-matter of the former contract of tenancy could not claim the benefit of the Acts at all. And there have been two later decisions which appear to me to point the way in which that second principle has now to be applied, and, subject only to one point (as I think of altogether too great refinement) to conclude this case. The first is *Fordree* v. *Barrell*,[8] which went to the House of Lords under the name of *Barrell* v. *Fordree*,[9] in which the problem arose because the tenant, who was the appellant in the House of Lords, had sublet or purported to sublet furnished a part of the premises of which he had been formerly the contractual tenant. There was no question of any physical and complete separation of the sublet part in that case; so much I think appears clearly from the statement of the facts in this court: *Fordree* v. *Barrell.*[10] The House of Lords held that the part which had been so sublet, being sublet for non-protected uses, was taken out of the protection of the Acts altogether, from which it followed that the tenant Barrell could claim protection only for that which remained and was occupied by him as his home.

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[7] [1931] 2 K.B. 546.
[8] [1931] 2 K.B. 257.
[9] [1932] A.C. 676.

Secondly came the case most strongly relied on in the court below by Mr. Hyamson of *Murgatroyd* v. *Tresarden*,[11] a decision of this court. The case may be fairly said to be entirely on all fours with the present, save in one respect. The decision proceeded upon the footing that the sub-division there was such as is properly described by the phrase " separate self-contained flats," a phrase which I earlier mentioned. Thus in the leading judgment of Somervell L.J. I find that after he had expressed difficulty owing to the paucity of the evidence, he said: " If a part of a " house was temporarily sublet, there being no real dividing off " of one part from another, I am, at any rate, not prepared to " lay down that the principle of *Skinner* v. *Geary*[12] would be " applicable. The defendant here has, however, been content to " let the case proceed on the basis that this house consisted of " two separate flats. There is no evidence that it has ever been " occupied as a single dwelling-house, though presumably it was " originally so built. The natural meaning of the word ' flat ' is, " I think, a separate self-contained dwelling, and I can see no " reason why the principle as laid down by Scrutton L.J. in " *Skinner* v. *Geary*[12] does not apply. The defendant has never " resided in the upper flat, he has no intention of residing there, " and he cannot, therefore, claim the protection of the Acts as " against the landlord."

That passage, particularly the last sentence, covers this case unless it can be said that it all turns on the point indicated, that here there is no such severance by physical or structural means as would justify the appellation of " separate self-contained flats " for the two upper floors. But I cannot myself see on the ground of logic or authority that that matter of fact is necessarily conclusive. I say nothing about what might happen, e.g., with a temporary subletting of a furnished room or rooms, having regard to section 9 of the Rent Act of 1949, a section not relied on in argument before us. But here the fact is that there was created (and created in fact before the statutory tenancy arose) such a sub-division—such a "real" sub-division, such a permanent cutting off of these floors from the rest—as made out of No. 141 Saltram Crescent not one dwelling-house but three dwelling-houses, distinct to this extent, that (as is conceded) the defendant has never occupied the upper two floors, and has no intention of residing in any part of them again, and that they now in fact constitute other people's distinct dwelling-houses.

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[10] [1931] 2 K.B. 257, 258.

[11] [1947] K.B. 316.

[12] [1931] 2 K.B. 546.

Barrell v. *Fordree*[13] does not appear to have been cited to the court in *Murgatroyd* v. *Tresarden*,[14] and had it been cited it might possibly—I know not—have affected the doubt which Somervell L.J. expressed; but I think that in any case the quaere which appears at the end of the headnote puts the matter overhigh in suggesting the necessity of actual structural and total physical severance. However that may be, and, acknowledging as I do the force and logic of Mr. David Wild's argument, I think, in the light of the decisions in *Barrell* v. *Fordree*[15] and *Murgatroyd* v. *Tresarden*,[16] that we can do no other than hold that in this case the defendant would only be entitled to assert and rely on the protection of the Rent Restriction Acts in respect of that which was occupied by him as his dwelling-house; and, ever since he became a statutory tenant, only the ground floor has satisfied that description. In the result, in my judgment we should allow this appeal.

In the course of Mr. Heathcote-Williams' opening I expressed some doubt as to the propriety of making an order for "possession" against a defendant limited to the part of the premises which he was not in fact occupying, and had no intention of occupying. Under the old law I think that such an order would have been inappropriate. But I think it is now too late to question whether in cases such as this that form of order is a proper one to make. Moreover the sub-tenants who are in occupation, and who are not before the court, are in any event protected by the express language of section 15 (3) of the Act of 1920. In the circumstances, therefore, I think the proper order will be that normally made in such cases, namely, an order for possession against the defendant limited to the first and top floors of No. 141 Saltram Crescent.

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[13] [1932] A.C. 676.

[14] [1947] K.B. 316.

[15] [1932] A.C. 676.

[16] [1947] K.B. 316.

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ROMER L.J. I agree, and if I add a few words it is only because we are differing from the judge below, though I confess I am not sure really on what ground he actually decided this case.

Section 15 (1) of the Act of 1920 provides: "A tenant who "by virtue of the provisions of this Act retains possession of any "dwelling-house to which this Act applies shall, so long as he "retains possession, observe and be entitled to the benefit of all "the terms and conditions of the original contract of tenancy. ". . ." That and the scope of the Acts generally have been interpreted, so far as protection from ejectment is concerned, as being confined to tenants who desire to live in their houses or, if away, to return there. It is plain in the present case that before the upper floors were sublet years ago the dwelling-house to which the Act of 1920 applied was No. 141 Saltram Crescent as a whole; it was one complete dwelling-house. But after the sublettings there were three dwelling-houses, instead of one dwelling-house to which the Act applied, and that I think is the necessary result of the decision in *Barrell* v. *Fordree*.[17] Apart from the argument with regard to structural alteration, there were three dwelling-houses, and of those three dwelling-houses the defendant himself occupied only one, and does not and never has intended to reoccupy the rest of the house which now comprises the other two.

It seems to me necessarily to follow that the two dwelling-houses not occupied by the defendant are occupied by the subtenants, and accordingly the defendant is not entitled to the statutory protection in regard to those flats because he does not occupy them, and has no intention of doing so. In my view, the question of physical division of these various dwelling-houses is immaterial for the purpose of deciding whether they are separate dwelling-houses for the purpose of the Act. There was no question of physical division in *Barrell* v. *Fordree*,[17] and it appears to me to be not only consistent with the speech of Lord Warrington in that case, but in strict conformity with it, that if there are separate dwelling-houses in one building within the accepted meaning of the phrase "dwelling-house," and exclusive possession as between the various occupants, then that is sufficient to justify treating them as separate dwelling-houses for the purpose of the Act even though there is nothing in the nature of physical separations between them.

I think accordingly that this case is completely covered by the principles laid down in *Barrell* v. *Fordree*,[17] and therefore that

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the appeal must be allowed. I will only add, speaking for myself, that I find it extremely difficult to grasp the conception presented to us that there may be in a building a dwelling-house for the purpose of the Act which is occupied at one and the same time both by the tenant of the building and by the sub-tenant to whom he granted the tenancy. It is the occupier of the dwelling-house, and the occupier alone, who gets the protection of the Acts. I agree with the order that my Lord proposes should be made.

HARMAN J. I agree.

Appeal allowed.

Solicitors: *Adam Burn & Son; John M. Morris & Co.*

H. C. G.

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Lord Goddard C.J., Finnemore and McNair JJ.

REGINA *v.* PEARCE.

Criminal Law—Sentence—Attempt—Substantive offence punishable with 12 *months' imprisonment—Impropriety of longer sentence for an attempt.*

Where an Act of Parliament prescribes a definite term of imprisonment as the punishment for an offence it is wrong for courts to impose any longer sentence on a person who is convicted only of an attempt to commit that offence.

Rex v. *Morris* [1951] 1 K.B. 394 applied.

REFERENCE by the Secretary of State.

The appellant, Sidney Arthur Pearce, was convicted at London Sessions in March, 1951, of an attempt to take and drive away a motor-car without the owner's consent. He had had three previous convictions, and received a sentence of three years' corrective training. His appeal against conviction had some time previously been dismissed by the court, who had not at that time considered the question of sentence as he had abandoned his appeal against sentence.

The appellant later petitioned the Home Secretary on the ground that he was not liable to be sentenced to corrective training, since, in sentencing him to three years' corrective training for an attempt, London Sessions had imposed a longer sentence on him than he could have received if he had been convicted of the full offence of taking and driving away a motor-car without the owner's consent, for which the maximum punishment was 12 months' imprisonment. The Home Secretary had now referred the whole matter to the court.

There were no counsel.

LORD GODDARD C.J. Pearce was convicted of the offence of attempting to take and drive away a motor-car without the consent of the owner, an offence under the Road Traffic Act, 1930, and two previous convictions were proved against him. It was also shown that he had been sent to Borstal on more than one occasion and had had at least three previous convictions. Sessions evidently thought, and I can on one view of the matter sympathize with their opinion, that it was a case for corrective training.

The difficulty that arises is that under the Road Traffic Act, 1930, s. 28 (1) (*b*), the maximum penalty prescribed for taking and driving away a motor-car without the consent of the owner is 12 months' imprisonment. This court has held, beginning with the case of *Rex* v. *Morris*,[1] that when a man is convicted of a common law misdemeanor the sentence is fine or imprisonment at the discretion of the court, and that it is no longer the law that the maximum sentence is two years' imprisonment. As the appellant had attempted to commit the offence, he was guilty of a common law misdemeanor; but of course it is not right if a man is convicted only of an attempt to commit an offence—although technically that may be a common law misdemeanor and therefore technically he may be liable to a fine or imprisonment at the discretion of the court—that he should be given a longer sentence for an attempt than he could have been given if he had committed the full offence. If he had not merely attempted to drive away this car but had actually driven it away the utmost sentence he could have received would have been 12 months' imprisonment. He could not have been sent to corrective training for that offence because it is not punishable with imprisonment for a term of two years or more within the Criminal Justice Act, 1948, s. 21 (1) (*a*).

In *Rex* v. *Morris*,[1] where the prisoner was indicted for conspiracy to smuggle goods, and it was argued that the misdemeanor of smuggling was not punishable by a longer sentence

[1] [1951] 1 K.B. 394.

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than two years' imprisonment, it was shown that the smuggling had been going on for a very long time and the conspiracy was one of the most dangerous description. We held, therefore, that Hallett J. was justified in passing a sentence of four years' imprisonment; but in giving the judgment of the court I said [2]: "Where the evidence showed that the only matter in which the "defendant had been concerned was one definite offence, it would "obviously be wrong, by means of indicting him for conspiracy, "to impose on him a longer sentence than he could have received "if he had been indicted merely for the substantive offence."

A fortiori that applies to an attempt, and if for the full offence Parliament has laid down a definite period it is wrong if he, the accused, is indicted for an attempt to give a longer sentence than could have been given for the substantive offence.

As the whole case was referred to us by the Secretary of State we can determine it under section 19 (*a*) of the Criminal Appeal Act, 1907, as if it were an appeal and accordingly direct that the prisoner be immediately discharged.

Order accordingly.

S. C.

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[2] [1951] 1 K.B. 394, 399.

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Oct. 15.

Lord Goddard C.J., Finnemore and McNair JJ.

MEAD *v.* CHELMSFORD RURAL DISTRICT COUNCIL.

Town and Country Planning—Enforcement notice under town planning scheme—Notice invalid as not stating date on which it comes into effect—No right of appeal against invalid notice—Invalidity a defence in proceedings to enforce notice—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 23 (3) (4), 24 (1).

An enforcement notice under section 23 (1) of the Town and Country Planning Act, 1947, is not valid unless it specifies both the date on which it is to become effective and also the date by which the work which it orders to be done is to be carried out.

Burgess v. *Jarvis and Sevenoaks R. D. C.* [1952] 2 Q.B. 41 followed.

Perrins v. *Perrins* [1951] 2 K.B. 414, is not an authority for the proposition that if a person on whom an enforcement notice is served fails to exercise the right of appeal against the notice given by section 23 (4) of the Act, he cannot, thereafter, object to the validity of the notice.

If, however, the ground on which he objects to its validity is one of those which could be raised on an appeal to justices, and he fails to appeal, he cannot thereafter question the validity of the notice in subsequent proceedings against him.

CASE STATED by Essex quarter sessions.

On November 15, 1951, the appellant was convicted before a court of summary jurisdiction for failure to comply with the terms of an enforcement notice served on him by the respondents, Chelmsford Rural District Council, as agents for the Essex County Council, the local planning authority for the purpose of the Town and Country Planning Act, 1947. He appealed to quarter sessions who affirmed the decision of the court of summary jurisdiction.

The following facts were proved or admitted on the hearing of the appeal before quarter sessions: The appellant was the occupier of the land which was the subject of the enforcement notice, and used it as a site for the deposit of waste, scrap and other materials in connexion with the business of a general dealer, in contravention of previous planning control within the meaning of the Town and Country Planning Act, 1947; the use constituted development within the meaning of the Act and was continuing.

By an enforcement notice dated June 27, 1951, the appellant was required to remove the materials from the land and to discontinue the use within 56 days after the service of the notice. A footnote to the notice contained the words "not less than 28 "days." The appellant had not obtained a grant of permission under Part III of the Town and Country Planning Act, 1947, for the use made by him of the land. No valid appeal against the notice was prosecuted by the appellant.

It was contended for the appellant before quarter sessions that the notice was defective and a nullity in that it did not specify a date upon which it was to take effect, as required by section 23 (3) [1] of the Act of 1947; that section 23 (4) of the Act

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[1] Town and Country Planning Act, 1947, s. 23 (2): "Any notice served "under this section (hereinafter called "an enforcement notice) . . . may "require such steps as may be specified in the notice to be taken within "such period as may be so specified "for restoring the land to its condition before the development took "place. . . ."

Subs. (3): "Subject to the provisions of the next following subsection, an enforcement notice shall "take effect at the expiration of such "period (not being less than twenty-"eight days after the service thereof) "as may be specified therein: . . ."

Subs. (4): "If any person on whom "an enforcement notice is served "under this section is aggrieved by "the notice, he may, . . . appeal "against the notice to a court of summary jurisdiction . . . and on any "such appeal the court—(*a*) if satisfied provided no effective appeal to a court of summary jurisdiction against a notice which was defective for the reason stated above; and that the appellant was entitled to rely on the defect alleged in the notice as a defence to a charge alleging non-compliance therewith.

For the council it was contended that, even if the notice were defective for the reason alleged, the appellant's failure to appeal against the notice under section 23 (4) of the Act precluded him from relying on the defect as a defence. It was further contended that quarter sessions had no jurisdiction to entertain the question of the validity of the notice.

Quarter sessions were of the opinion that the case was within the principle established in *Perrins* v. *Perrins*,[2] and that they had no jurisdiction to entertain the question raised by the appellant as to the validity of the notice. They accordingly confirmed the decision of the court of summary jurisdiction.

Percy Lamb Q.C. and *L. Jellinek* for the appellant.
F. W. Beney Q.C. and *V. G. Hines* for the council.

LORD GODDARD C.J. This is a case stated by the appeal committee of the quarter sessions for the county of Essex, to which court the appellant appealed against a conviction by justices for the offence of disregarding an enforcement notice; I think that is a compendious way of putting it. He used certain land in respect of which town planning existed; he had a notice served on him ordering him to discontinue the use of the land for the purpose for which he was using it; he ignored that notice, and accordingly he was summoned and fined. He appealed to quarter sessions against that conviction, and at quarter sessions

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"that permission was granted . . . "for the development to which the "notice relates, or that no such per- "mission was required in respect "thereof, or, as the case may be, that "the conditions subject to which such "permission was granted have been "complied with, shall quash the notice "to which the appeal relates; . . ."

S. 24 (1): "If within the period "specified in an enforcement notice, ". . . any steps required by the notice "to be taken (other than the discon- "tinuance of any use of land) have "not been taken, the local planning "authority may enter on the land and "take those steps, and may recover ". . . from the person who is then "the owner of the land any expenses "reasonably incurred by them in that "behalf; and if that person, having "been entitled to appeal to the court "under the last foregoing section, "failed to make such an appeal, he "shall not be entitled in proceedings "under this subsection to dispute the "validity of the action taken by the "local planning authority upon any "ground which could have been raised "by such an appeal."

[2] [1951] 2 K.B. 414.

he desired to take the point that the notice served on him was a bad notice and that, therefore, he should never have been convicted by the justices because, of course, he would not be bound to comply with the notice if it was not a notice such as the Act required. Quarter sessions, on hearing the nature of the case, said that they had no jurisdiction to entertain the appeal because in their view it was entirely covered by the decision of this court in *Perrins* v. *Perrins*,[3] and accordingly dismissed the appeal. But, with all respect to the chairman and the appeal committee, I find great difficulty in understanding how they thought that the decision in *Perrins* v. *Perrins* [3] had anything to do with the present case.

The facts of the present case are these: A notice was served on Mr. Mead on June 27, 1951, and it is only fair to say that the notice was given several months before the decision of the Court of Appeal in *Burgess* v. *Jarvis and Sevenoaks R.D.C.*,[4] to which I will refer later, and I have no doubt that if the Court of Appeal had given their decision at the time when this notice was served, it would have been in a very different form. The notice was one which required the appellant to remove materials from the land and to discontinue the use "within 56 days after "the service of this notice. Dated this 27th day of June, 1951"; and a footnote was appended "not less than 28 days." I do not know whether that was intended to make the notice clearer or more obscure; I should have thought it made it more obscure, especially when it is found that section 23 (3) of the Act says "an enforcement notice shall take effect at the expiration of "such period (not being less than twenty-eight days after the "service thereof) as may be specified therein." The appellant, as I say, desired to contend that it was a defective notice on the ground that the section requires that the enforcement notice must specify the date at which it is to take effect. I should have thought that there is only one construction that could be placed upon those words, and that is that the notice must specify the date at which it is to take effect, and that such date must be not less than 28 days after the service of the notice, the object of that being to give the person affected by the notice a chance of appealing or a chance of seeing the town planning authority and perhaps persuading them to take a different view. Subsection (2) of section 23 also provides that the notice must specify the time within which the work is to be done after the notice takes effect. This notice does not say when it is to take effect; it simply tells the appellant that he is to discontinue using the land for the purpose within 56 days after the service of the notice. Mr. Beney has suggested to us that we ought to read that as meaning that the notice will take effect in 28 days and that the appellant has 28 further days in which to do the work. We cannot hold that that is what the notice says or that such a construction would comply with the words of the section. The opinion which we have formed is exactly the same as that taken by the Court of Appeal in *Burgess* v. *Jarvis*.[5] As I have said, had that case been decided before this notice was served, it would have been put in a different form. The Court of Appeal took the same view as we do. Mr. Beney, with some courage, said that as the present was a criminal case we should be at liberty to disregard the decision of the Court of Appeal, but I should be sorry to disregard a decision of the Court of Appeal merely because we were sitting on an appeal from justices and they were sitting on an appeal from a judge in chambers in a civil proceeding. Not only should I not feel at liberty to differ from them on such a point as that but, apart from the judgment of the Court of Appeal in that case, the section we are considering can only be construed in one way, in my opinion, and that is that two dates must be put in the notice, that is, the date when the notice is to take effect, which must be not less than 28 days from the service, and the date within which the work is to be done from the time when the notice takes effect. That was not done in the present case, and that was the point the appellant desired to take. He wanted to say: "I have had "a bad notice served on me; therefore I have committed no "offence," and it appears to us that he had not committed an offence because this notice was a bad notice.

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[3] [1951] 2 K.B. 414.

[4] [1952] 2 Q.B. 41.

The difficulty which seems to have been present in the minds of quarter sessions was this: section 23 (4) gives certain rights of appeal against a notice. That means, of course, against a valid notice and not against a piece of waste paper; I say "waste "paper" as meaning something that does not comply with the Act. The section continues: "and on any such appeal the court "(*a*) if satisfied that permission was granted under this Part of "this Act for the development to which the notice relates, or "that no such permission was required in respect thereof, or, as "the case may be, that the conditions subject to which such

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[5] [1952] 2 Q.B. 41.

"permission was granted have been complied with, shall quash "the notice to which the appeal relates; (*b*) if not so satisfied, "but satisfied that the requirements of the notice exceed what "is necessary for restoring land to its condition before the "development took place, or for securing compliance with the "conditions, as the case may be, shall vary the notice "accordingly." That is what can be done on an appeal against a notice, that is to say, against what a person is required to do by the notice. He can say: "This notice never ought to have been "served upon me because I did not require permission," or "I "have carried out the conditions which were in the notice"; or, "This notice exceeds what it is reasonable that I should be "called upon to do."

Section 23 (3) does not provide for an appeal against the notice on the ground that it is a bad notice, and I am not surprised that it does not, because if the notice is a bad notice it is not a question of appealing against it, but of a person who is summoned in respect of non-compliance with the notice, saying that he had never had a valid notice served on him and that was what the appellant tried to do in the present case. Quarter sessions, as I have said, thought that they were bound by the decision of this court in *Perrins* v. *Perrins*,[6] but that case had nothing to do with the present. It was a case in which an occupier of land, which he used as a camping site, received a notice under the Town and Country Planning Act to cease using it for that purpose. When he was summoned for disobeying that notice he desired to take the point that he ought not to have been served with it because he had always used the land for a camping site. The court said that he could not go into that because the matter was covered by section 23 of the Act; his objection was to the notice, and objection to the notice must be taken by way of appeal against the notice. If that were not done, the objection could not be made in any other proceedings against him for non-compliance with the notice. That decision has no application to the present case because the point here was not one which could be taken before the justices by way of appeal and, therefore, the appellant could raise it by way of the defence.

The case must go back to quarter sessions with an intimation, firstly, that they had jurisdiction to hear the appeal, and secondly, that in view of the decision in *Burgess* v. *Jarvis and Sevenoaks*

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[6] [1951] 2 K.B. 414.

R.D.C.[7] and of the opinion of this court, it is quite clear that the enforcement notice in this case was bad and that they ought to allow the appeal.

FINNEMORE J. I agree.

MCNAIR J. I agree.

Appeal allowed.

Solicitors: *Robbins, Olivey & Lake, for W. P. Hill, Hertford; Torr & Co., for Stamp, Wortley & Co., Chelmsford.*

P. B. D.

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[7] [1952] 2 Q.B. 41.

1952
Oct. 24.

Lord Goddard C.J., Finnemore and McNair JJ.

MOONEY *v.* MOONEY.

Bastardy — Wife's application against husband — Child born during previous marriage—Mother's refusal to live with husband—Whether a "single woman"—Bastardy Laws Amendment Act, 1872 (35 *&* 36 *Vict. c.* 65), *s.* 3.

A wife who had deserted her husband sought an affiliation order against him in respect of a child of theirs born during her previous marriage: —

Held, that the wife was not a "single woman" within the meaning of section 3 of the Bastardy Laws Amendment Act, 1872, and was not, therefore, entitled to an order. The line of authorities deciding that in certain circumstances a married woman might be regarded as a "single woman" quoad third parties under the Act of 1872 did not extend to enable a married woman to be regarded as a single woman quoad her own husband.

Jones v. *Evans* [1944] K.B. 582 considered.

CASE STATED by Lancashire justices.

A complaint was preferred under the Bastardy Laws Amendment Act, 1872, by the appellant, Mrs. Marguerite Mooney, against the respondent, William Mooney, her husband, alleging that he was the father of a bastard child born to her on April 21, 1948.

At the hearing of the complaint the following facts were proved or admitted. An illegitimate child was born on April 21, 1948, to the appellant, who at the time of its conception and birth was a married woman, the wife of a previous husband. She had lived apart from that husband since about 1940 and had not seen him since that year. She obtained a decree nisi of divorce against him on May 11, 1948, on the ground of his cruelty, and that decree was made absolute on June 24, 1948.

The mother had been associating and committing adultery with the respondent for about a year before the birth of the child, and the respondent registered the birth of that child, described himself as the father, and his name appeared as such on the birth certificate. The mother married the respondent on August 21, 1948, and from then until July, 1951, the respondent maintained the child. On July 25, 1951, the mother left the respondent in circumstances which precluded her from obtaining an order against him under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the ground of desertion, as she unsuccessfully sought such an order on November 7, 1951. She did not live with the respondent after July 25, 1951, and had no intention of returning to him.

The respondent alleged that he had been paying money each week to the mother for the maintenance of her child and that he wished the mother to return to the matrimonial home.

The justices dismissed the complaint. They were of opinion that the respondent was in fact the father of the child in question, but that the mother was not a "single woman" within the meaning of section 3 of the Bastardy Laws Amendment Act, 1872.[1]

The mother appealed.

D. G. Homfray-Davies for the mother. This appeal raises the question in what circumstances a married woman may be regarded as a "single woman" within the meaning of section 3 of the Bastardy Laws Amendment Act, 1872. From early times courts have held that in various circumstances a married woman may be regarded as a single woman for these purposes, and the authorities were summarized by Atkinson J. in *Jones* v. *Evans*.[2] The principle of the early cases is that a married woman who for some reason lives apart from her husband may be regarded as a single woman and so lay a complaint against the natural father of her illegitimate child: *Reg.* v. *Collingwood*[3] and *Rex* v. *Flintan.*[4]

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[1] Bastardy Laws Amendment Act, 1872, s. 3: "Any single woman who "may be . . . delivered of a bastard "child . . . may . . . make application . . . for a summons to be served "on the man alleged by her to be the "father of the child."

[2] [1944] K.B. 582.

[LORD GODDARD C.J. But surely that principle does not apply where the separation was the wife's fault?]

It is submitted that that makes no difference; it is sufficient if husband and wife are in fact separated in such circumstances that the wife cannot obtain maintenance from her husband. *Jones* v. *Evans*[5] shows that it makes no difference if the wife has deprived herself of the right to maintenance by her own conduct. There is a distinction between the present case and decisions such as *Taylor* v. *Parry*,[6] where the married woman was living with her husband at the time of the application. The appellant was not living with her husband when she made the application and she should be regarded for the purposes of the application as a single woman.

It is submitted that the object of the courts in giving such an extended meaning to the words "single woman" in the Act of 1872 was to ensure as far as possible that there was someone to whom the wife or the Guardian could look for maintenance in respect of an illegitimate child: see *Reg.* v. *Collingwood*[7] and *Stacey* v. *Lintell*,[8] *per* Lush J. Where the mother had married after the birth of the illegitimate child her husband was by section 57 of the Poor Law Amendment Act, 1834, liable to maintain it. In such circumstances courts refused to allow the mother to bring affiliation proceedings against the putative father on the ground that to do so was unnecessary and would create the anomalous position of there being two men both liable at the same time to maintain the same child. It is submitted that that was the ratio decidendi of the decisions in *Stacey* v. *Lintell*[8] and *Tozer* v. *Lake*,[9] and not per se that the applicant was a married woman living with her husband.

The provision in section 57 of the Poor Law Amendment Act, 1834, which was re-enacted by section 14 (3) of the Poor Law Act, 1930, was repealed by section 62 and Sch. VII to the National Assistance Act, 1948, which provided that a man was only liable to maintain his own children. The reason for the limitation imposed by the court in *Stacey* v. *Lintell*[10] has, therefore, disappeared, and it is submitted that the decisions based on that limitation are no longer binding on the court. If a woman now marries after the birth of an illegitimate child she can look to no one to maintain it unless she can obtain an affiliation order against the putative father. It is no real extension of the principle enunciated by Lush J. in *Stacey* v. *Lintell* [10] to allow a woman to bring affiliation proceedings in these circumstances.

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[3] (1848) 12 Q.B. 681.
[4] (1830) 1 B. & Ad. 230.
[5] [1944] K.B. 582.
[6] [1951] 2 K.B. 442.
[7] 12 Q.B. 681.
[8] (1879) 4 Q.B.D. 291, 294.
[9] (1879) 4 C.P.D. 322.
[10] 4 Q.B.D. 291.

[LORD GODDARD C.J. But in *Taylor* v. *Parry* [11] the court held that the Act of 1948 had made no alteration in the bastardy laws.]

That is so, but the effect of the Act is nevertheless to sweep away the basis of many of the old decisions, such as *Stacey* v. *Lintell* [12] and *Tozer* v. *Lake*.[13] It is submitted that there is no real distinction between the position where a wife who is separated from her husband seeks an affiliation order against a third party and the position here, where the order is sought against the appellant's own husband. The case is without precedent and there is nothing to prevent this court from deciding that the appellant is a "single woman" for the present purposes even as against her own husband.

The respondent did not appear and was not represented.

Cur. adv. vult.

LORD GODDARD C.J. [after stating the facts]:—Mr. Homfray-Davies has argued with vigour and has called our attention to all the relevant authorities, which, indeed, are summarized in Atkinson J.'s judgment in *Jones* v. *Evans*.[14] He has contended that the appellant should, on the authority of those cases, be regarded as a single woman. As I said in the course of the argument, Parliament might have provided that any woman who was delivered of a bastard child could maintain affiliation proceedings against the putative father, but Parliament has only given that right to a single woman. In mercy to women, however, courts have construed the words "single woman" in section 3 of the Bastardy Laws Amendment Act, 1872, to mean a woman whose husband has either left her or been absent from her against her will at the time of conception or has been taken from her, like a soldier or a sailor or, as in one case, a man who was sentenced to transportation. I suppose that that would apply now to a man who was sentenced to a long term of imprisonment, although it is not necessary to decide it.

This court decided in *Taylor* v. *Parry* [15] that for the purpose of considering whether a married woman can be considered as a "single woman" within the Act of 1872, the National Assistance Act, 1948, which since it became law has put the obligation on a man to support his own children and on a woman to support her own children, makes no difference: so that, consequently, a man is no longer under an obligation to support his wife's illegitimate children. But it is said here that as the wife is not living with her husband now, she falls within the category of single women on account of a long line of authorities dating from the 1820's. In my opinion, that is not so. No case has ever yet gone the length of deciding that a married woman can be regarded as a single woman quoad her own husband. What has been decided is that a married woman who is not living with her husband, whose husband is serving abroad or has deserted her, can, quoad a third party, be considered as a single woman. In a way it is an anomaly that that should be so, but the anomaly was introduced because it was thought that that would really do justice and be consonant with the spirit of the bastardy laws; but the argument in this case amounts to asking the court to take an enormous step forward and to say that a married woman who summons her husband can claim that she is a single woman. Still more would it be anomalous when the fact that she is not living with her husband is not his fault but her own, and he wants to have her back and will support her and her child but she refuses to go back.

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[10] 4 Q.B.D. 291.
[11] [1951] 2 K.B. 442.
[12] 4 Q.B.D. 291.
[13] 4 C.P.D. 322.
[14] [1944] K.B. 582.
[15] [1951] 2 K.B. 442.

In those circumstances it seems to me impossible to bring this case within the line of authorities which for certain purposes have allowed a married woman to be considered a single woman within the meaning of these Acts. For these reasons I think that the justices came to a right decision.

FINNEMORE J. I agree.

MCNAIR J. I agree.

Appeal dismissed.

Solicitors: *Dubovie, Freeman & Co., for A. D. Abrahamson & Co., Liverpool.*

S. C.

WOOLLEY *v.* MOORE.

1952
Oct. 21.

Lord Goddard C.J., Finnemore and McNair JJ.

Road Traffic—Goods vehicle—Speed limit—Goods vehicle licensed under C licence—Unladen van used for carriage of passengers on road not in built-up area—No speed limit—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 10, *Sch. I—Road Traffic Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *Sch. I—Road and Rail Traffic Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *ss.* 8, 9*—Motor Vehicles* (*Variation of Speed Limit*) *Regulations,* 1950 (*S.I.* 1950, *No.* 1705), *r.* 2.

Where a motor van which is licensed under Part I of the Road and Rail Traffic Act, 1933, is being used solely for the carriage of passengers, it is not then subject to the speed limit of 30 miles an hour which Sch. I to the Road Traffic Act, 1930 (as amended by section 2 of the Road Traffic Act, 1934, and varied by the Motor Vehicles (Variation of Speed Limit) Regulations, 1950) imposes on motor cars "authorized to be used under a licence" granted under Part I of the Act of 1933.

Blenkin v. *Bell* [1952] 2 Q.B. 620 applied.

CASE STATED by Nottingham justices.

An information was preferred by a chief superintendent of police against the defendant, Eric Bernard Herbert Woolley, alleging that on April 12, 1952, at Bestwood, he unlawfully drove a motor-van on a road at a speed greater than 30 miles an hour, the speed specified in Sch. I to the Road Traffic Act, 1934, as the maximum speed in relation to a vehicle of that class or description, contrary to section 10 of the Road Traffic Act, 1930,[1] as amended by section 2 of the Road Traffic Act, 1934.[2]

At the hearing of the information the following facts were proved or admitted. On April 12, 1952, the defendant drove his Standard Vanguard motor-van at a speed of between 50 and 55 miles an hour along a road which was not subject to any speed limit. On inspection the van was found to contain no goods, it merely contained a driver's seat and a passenger's seat, there being no seats in the rear of the van, which was empty. There were windows in the back of the van but no side windows, apart from those beside the driver's and passenger's seats. The van's unladen weight was 1 ton 2 cwt., and all its wheels were equipped with pneumatic tyres. The defendant was the director of a company which owned the van, and this company held a goods carrier's C licence for the vehicle granted under Part I of the Road and Rail Traffic Act, 1933. The van was duly licensed under the Vehicles (Excise) Act, 1949, and described as a " goods " vehicle " for that purpose, and appropriate duty on a vehicle of that description had been paid.

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[1] Road Traffic Act, 1930, s. 10 (1): "It shall not be lawful for any "person to drive a motor vehicle of "any class or description on a road "at a speed greater than the speed "specified in the First Schedule to "this Act as the maximum speed in "relation to a vehicle of that class or "description. . . ."

[2] S. 2 of the Road Traffic Act, 1934, substitutes the First Schedule to that Act for the First Schedule to the Road Traffic Act, 1930. The First Schedule to the Road Traffic Act, 1934, provides that the maximum speed shall be for "2. *Goods vehicles,* "that is to say, vehicles constructed "or adapted for use for the convey- "ance of goods or burden of any "description:—(1) . . . (*a*) Motor- "cars and motor cycles . . . 30" miles per hour.

The defendant had at times used the van for his own personal purposes and was at the material time testing it after certain adjustments.

It was contended for the defendant that, since the van was not being used for carrying goods, no speed limit was applicable to it while travelling on the road in question.

On the part of the prosecutor it was contended that the van was at all times a goods vehicle as defined in the Road Traffic Act, 1934, Sch. I, para. 2, as amended by the Motor Vehicles (Variation of Speed Limit) Regulations, 1950,[3] and was at all times subject to a speed limit of 30 miles an hour.

The justices found the defendant guilty, fined him 40s., and ordered his licence to be indorsed.

In convicting the defendant the justices were of the opinion that the van was a " goods vehicle " as defined in Sch. I, para. 2, to the Road Traffic Act, 1934, and was not a shooting-brake or utility van, the dual-purpose class of vehicle covered in *Blenkin* v. *Bell*[4]; that the speed limit applicable was 30 miles an hour whether the van was being used for the carriage of goods or not; and that the amended provisions substituted by the Motor Vehicles (Variation of Speed Limit) Regulations, 1950, for those in para. 2 of Sch. I to the Act of 1934, had not varied the speed limit for motor-vans. They further considered that to hold otherwise would result in freeing entirely from speed limit outside built-up areas any pneumatic tyred goods vehicles up to 3 tons of unladen weight when not carrying goods, and that this was neither the intention nor the effect of the relevant Acts and regulations.

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[3] Motor Vehicles (Variation of Speed Limit) Regulations, 1950 (S.I. 1950, No. 1705): " 2. The provisions " of the First Schedule to the Act " [the Road Traffic Act, 1930] " as " substituted by the Road Traffic " Act, 1934, and as varied by . . . " Regulations . . . shall be further " varied and have effect as though in " sub-paragraph (1) of paragraph 2 " . . . there were substituted for sub- " division (*a*) the following sub- " divisions:—(*a*) motor-cars . . . " which are authorized to be used " under a licence granted under Part " I of the Road and Rail Traffic Act, " 1933, . . . 30."

[4] [1952] 2 Q.B. 620.

The defendant appealed.

Norman Skelhorn for the defendant. This appeal raises the question whether the decision in *Blenkin* v. *Bell*[4] is confined to dual-purpose utility vehicles, such as shooting-brakes. It is submitted that the decision there applies to motor-vans which are not used for the carriage of goods and that, accordingly, such vehicles are, when so used, not subject to the speed limit for goods vehicles specified in Sch. I to the Road Traffic Act, 1930, as amended and varied by Sch. I to the Road Traffic Act, 1934, and the Motor Vehicles (Variation of Speed Limit) Regulations, 1950.

The Road and Rail Traffic Act, 1933,[5] which requires the grant of a licence before a goods vehicle may lawfully be used for the carriage of goods for hire or reward or in connexion with any trade or business, clearly shows that, in order to require a licence under Part I of that Act, a vehicle must not only be constructed for the conveyance of goods but must also be used for the conveyance of goods. As the defendant was not at the material time using his motor van for the carriage of goods, but was using it in a way which did not require the authority of a licence, he was no longer subject to the conditions attaching to the licence and could, therefore, travel at more than 30 miles an hour. The words in the regulation, ". . . which are authorized "to be used under a licence granted under Part I" of the Act of 1933, must be construed as meaning "used in a manner "requiring the authority of a licence:" otherwise the curious result would follow that if a vehicle which was required by law to have a "C" licence did not in fact have one, it would not be subject to a speed limit.

[LORD GODDARD C.J. I think that whether the decision in *Blenkin* v. *Bell*[6] be right or wrong it still stands, as the legislature has not taken steps to alter it.]

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[4] [1952] 2 Q.B. 620.

[5] Road and Rail Traffic Act, 1933, s. 1 (1): "Subject to the provisions "of this Part of this Act, no person "shall use a goods vehicle on a road "for the carriage of goods—(*a*) for "hire or reward; or (*b*) for or in "connexion with any trade or business carried on by him, except "under a licence."

[6] [1952] 2 Q.B. 620.

Blenkin v. *Bell*[6] is clearly binding on this court: see *Police Authority for Huddersfield* v. *Watson.*[7]

Cowley for the prosecutor. A motor-van is not a dual-purpose vehicle like the shooting-brake which was the subject of the decision in *Blenkin* v. *Bell*,[8] and that decision should not be applied to this case. [Counsel referred to *Manning* v. *Hammond*,[9] and distinguished it.]

LORD GODDARD C.J. (after stating the facts). I can well understand that the justices thought that they must put some limit on the decision of this court in *Blenkin* v. *Bell*,[10] and I certainly sympathize with them and with this court in having to consider the multiplicity of regulations and statutory provisions which concern motor-cars. I was given by the Chief Constable of Aberdeen a most useful collection of statutes and orders which he has made, and I find that it only runs to 397 pages of matters which persons using motor-cars have to bear in mind. I entirely agree with the following words which he writes in his preface: "Anyone who has had occasion to refer to the law concerning the "use of vehicles on roads must be well aware of the complexity "of its provisions. It is to be found widespread over a large "number of Acts, regulations, orders, etc., and some of its "provisions are even to be found in purely emergency legislation. Not only is it dispersed and hard to find, but it has been "subjected to frequent amendment leaving it in a mutilated, "untidy condition. The result is that at the present time it is "very difficult for anyone to find his way with confidence "amongst the mass of legislation on this subject."

I entirely agree with every word of that. I commend to the particular attention of anyone who wishes to see the sort of regulation which one has to construe the Motor Vehicles (Variation of Speed Limit) Regulations, 1950. If that was put into the hands of anybody who was not an expert in these matters it would mean exactly nothing; and even to an expert it would mean referring to numerous statutes and regulations. I cannot understand why a Ministry which makes a regulation varying the speed of certain vehicles considers it necessary to do so by reference to all the things it wishes to alter instead of by setting out in a concise manner the intended change in the law.

However, this very point, in my opinion, came before this

[6] [1952] 2 Q.B. 620.
[7] [1947] K.B. 842.
[8] [1952] 2 Q.B. 620.
[9] [1951] W.N. 525.
[10] [1952] 2 Q.B. 620.

court earlier this year in *Blenkin* v. *Bell*,[10] when the court had before them all the statutory provisions and statutory rules and orders concerning these delivery vans. In that case the court decided, largely, I think, because of section 9 (2) of the Road and Rail Traffic Act, 1933, that although a vehicle which was constructed as a goods vehicle and was also capable of carrying passengers had a carrier's C licence, the conditions of that licence did not apply to it when it was not being used for the carriage of goods. We decided, therefore, that the speed limit of 30 miles an hour to which it was subjected when carrying goods was not applicable when carrying passengers only, and we gave that decision after we had considered and tried to straighten out this tangle of sections and regulations. We came to the conclusion that we could give a construction to this mass of regulations and statutes which was in accordance both with justice and common sense.

The decision in *Blenkin* v. *Bell*[10] did not in any way turn on the fact that the vehicle there in question was a shooting-brake, a dual-purpose vehicle in the sense that people use it for the carriage of goods and passengers—and I think that I made that clear as part of the judgment of the court when I said[11]: "One "has a vehicle which can be used either for carrying passengers "or goods or both. If it is being used for carrying goods as "distinct from passengers' luggage it requires a certain licence "and certain restrictions are placed on it as long as it is being "used as a goods vehicle. If it is not being used as a goods "vehicle it would not require that licence; it would only require "the licence while carrying goods, and the speed limit is only "applicable when it is carrying goods."

That decision of this court the Home Secretary has so far recognized that in several cases where people have been convicted contrary to the decision in *Blenkin* v. *Bell*[11] he has granted free pardons and the fines have been returned. We are not now, therefore, going to entertain an argument that that decision is wrong. It has been acted on by the Crown in granting free pardons. If the Ministry or other authority concerned think that it is wrong it can only be altered by legislation—but I am not expressing any doubt as to the correctness of the decision.

It follows that the justices' decision was wrong and this conviction must be quashed because the case is entirely governed

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[10] [1952] 2 Q.B. 620.

[11] Ibid. 627.

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by and is indistinguishable from *Blenkin* v. *Bell*,[11] by which this court is bound and to which this court intends to adhere.

FINNEMORE J. I agree that this case is indistinguishable from *Blenkin* v. *Bell*[11] by which this court is bound. I would respectfully agree that the decision in *Blenkin* v. *Bell*[11] was right and this case falls within it. I agree that the appeal should be allowed.

McNAIR J. I agree. The case is clearly indistinguishable from the decision in *Blenkin* v. *Bell*.[11]

Appeal allowed.

Solicitors: *A. J. A. Hanhart, for Clayton, Ellis & Massey, Nottingham; William Charles Crocker, for R. A. Young & Pearce, Nottingham.*

S. C.

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[11] [1952] 2 Q.B. 627.

C. A.

1952
Oct. 21, 22.

Evershed M.R.,
Romer L.J.
and Harman J.

DOBBS *v.* LINFORD.

[Plaint No. 3169.]

Landlord and Tenant—Rent restriction—Covenant not to use the premises otherwise than "as a private dwelling-house"—Tenant sublets top floor—Whether premises "lawfully sublet"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15 (3).

A tenancy agreement made in 1936 of a dwelling-house within the Rent Restriction Acts contained a covenant by the tenant "not to use the said premises for any purpose other than as a "private dwelling-house And not to sublet or part with the "possession of the premises (except as a furnished house) without "the consent in writing of the landlord such consent not to be "unreasonably withheld in the case of a respectable and respon"sible person." Unknown to the landlord the tenant had in 1943 sublet the top floor to the defendant as a self-contained flat. The tenant having died, in these proceedings the landlord sought to recover possession against the sub-tenant. The sub-tenant claimed that the premises had been lawfully sublet to her and that she had become the tenant of the landlord by virtue of section 15 (3) of the Rent and Mortgage Interest (Restrictions) Act, 1920. The county court judge made an order for possession:—

Held, that the subletting of part of the demised premises was a breach of the covenant not to use the premises for any purpose other than "as a private dwelling-house." If that covenant had been followed by a covenant not to sublet or part with possession of the premises or "any part thereof" that would have been relevant in construing the covenant as to user as "a private "dwelling-house." The covenant as to user was inconsistent with the reservation of any right to the tenant to sublet part of the premises. The subletting was in breach of covenant and the landlord was entitled to possession.

Barton v. *Keeble* [1928] Ch. 517 approved.

Downie v. *Turner* [1951] 2 K.B. 112 considered and distinguished.

APPEAL from a decision of Judge Archer sitting at Chichester county court.

By a tenancy agreement dated April 25, 1936, the plaintiff, Miss Edith Sybil Dobbs, agreed to let to Miss May Sophia Miller New Barn Lodge, Felpham, being premises within the Rent Restriction Acts, for three years certain from April 25, 1936, at a rent of £65 per annum. That agreement contained a covenant by the tenant: "Not to use the said premises for any purpose "other than as a private dwelling-house and not to sublet or "part with the possession of the premises (except as a furnished "house) without the consent in writing of the landlord such "consent not to be unreasonably withheld. . . ." Finally the agreement provided: "If any rent shall be in arrear for seven "days whether legally demanded or not or there shall be any "breach by the tenant of the conditions herein contained the "landlord or her agent may re-enter upon the premises without "giving any notice to quit and expel the tenant therefrom."

Unknown to the landlord the tenant had in 1943 sublet the top floor of the premises as a self-contained flat to the defendant, Mrs. Linford. The tenant died in 1951 intestate. No grant of administration had been taken out to her estate but on her death her brother returned the keys of the premises to the landlord, who then discovered that the sub-tenant was in possession of the top floor as sub-tenant and claimed to retain possession under section 15 (3) of the Rent and Mortgage Interest (Restrictions) Act, 1920, as a person to whom part of the premises had been "lawfully sublet."

In proceedings by the landlord to recover possession the county court judge made an order for possession against the sub-tenant, holding that the subletting was in breach of the tenant's covenants

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in the tenancy agreement and that there had been no waiver of such breach.

The sub-tenant appealed.

Christopher French for the sub-tenant. It is submitted that the county court judge was wrong in holding that the subletting of part of the premises was in breach of the covenant in the tenancy agreement. That covenant should be construed strictly and if there is any doubt as to its true meaning it should be construed against the landlord. The effect of the covenant to use for no purpose "other than as a private dwelling-house" is to prevent user for business purposes. It does not according to its terms prohibit a division of the premises into two dwelling-houses. A house remains a private dwelling-house although it may comprise two or more private dwelling-houses for the purposes of the Rent Restriction Acts.

The covenant against subletting or parting with possession on its true construction does not prohibit the subletting of part of the premises. The decision in *Downie* v. *Turner*,[1] *Cook* v. *Shoesmith*[2] and *Grove* v. *Portal*[3] shows that a tenant is entitled to sublet part of demised premises where this is not expressly prohibited.

Eve J. held in *Barton* v. *Keeble*[4] that a covenant to use premises as a dwelling-house was broken when part was sublet; it is submitted that that case is distinguishable since the subletting there amounted to the carrying on of a business. If it is not distinguishable, that case was wrongly decided. The court should not construe this covenant so as to result in a forfeiture. [He referred to *Berton* v. *Alliance Economic Investment Co. Ld.*[5]] The fact that this dwelling-house was being used as two separate dwellings does not prevent it continuing to be "a private "dwelling-house." The court should not construe this covenant as if it were a covenant not to use otherwise than as a "single" private dwelling-house. It is submitted that the subletting was lawful, and accordingly the sub-tenant has under section 15 (3) of the Rent Restrictions Act of 1920 become the tenant of the landlord and entitled to the protection of the Acts. It follows that no order for possession should have been made against her.

H. G. Garland for the landlord was not called on to argue.

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[1] [1951] 2 K.B. 112.

[2] [1951] 1 K.B. 752.

[3] [1902] 1 Ch. 727.

[4] [1928] Ch. 517.

[5] [1922] 1 K.B. 742.

ROMER L.J., after stating the facts:—The county court judge held, as a matter of construction, that the sub-lease did constitute a breach of covenant. He treated it as a question of construction of the lease, and in my judgment he was right in so treating it. He held that the covenant not to use the premises for any other purpose than as a private dwelling-house was an obligation on the tenant to use the premises for that purpose and for that purpose only, and that it could not be said that she was complying with that obligation if she were using part of the dwelling-house as a private residence for herself, and was subletting another part to somebody else, even if that other person was using it, and was bound to use it, as a private residence.

The ground on which the judge arrived at that conclusion was that the phrase " a private dwelling-house " envisages the use of the whole building as one dwelling-house, and therefore it creates a conception which is broken by, or is inconsistent with, the division of the house into more than one residence.

Mr. French on behalf of the sub-tenant says that notwithstanding the covenant not to sublet or part with the possession of the premises without the consent in writing of the landlord, the tenant can grant a sub-lease or part with the possession of a part of the premises without breaking the covenant against subletting, and he cited a number of cases in support of that proposition, the first of which was *Downie* v. *Turner*,[6] a decision of this court.

In that case both Somervell and Jenkins L.JJ. referred to the question whether an underletting of part of a house to be used as a dwelling-house by a sub-tenant is a breach of a covenant not to use the demised premises for any other purpose than as a private dwelling-house, and they made certain observations upon that to which I do not think that I need refer, because it appears to me that the language of the agreement in that case was different in a vital respect from the language of the agreement in the present case. I say that because the agreement in that case contained the following terms, among others: " The tenant will not during " such tenancy underlet the premises or any part thereof without " the previous consent in writing of the landlord." Accordingly, there, it was expressly contemplated that the house might be divided into more than one dwelling-house, and therefore a different consideration was present in that case from that which is present here.

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[6] [1951] 2 K.B. 112.

The same kind of idea was also expressed in *Cook* v. *Shoesmith*[7] and *Grove* v. *Portal*.[8] It does not appear to me that there is room for that kind of contention where the agreement contemplates that the subject-matter of the demise is to be used as one dwelling-house and not more. If, in fact, as in effect we are invited to find, this covenant against subletting or parting with possession had been followed by a proviso to the effect that the tenant might sublet or part with the possession of part of the premises, that would have been a very relevant consideration for the purpose of construction, as throwing light on what was meant by the expression "other than as a private dwelling-house."

But the point is that there is no such qualification, and it seems to me that it would be impossible to say in the case before us that if the judge be right it amounts to a derogation of the right of the tenant to sublet a part, because in effect there is no grant of any such right. It is quite true that if a landlord grants a tenancy of certain premises, then prima facie that carries with it the right to alienate, and it may be said that, if one takes a covenant which qualifies that general right, then, in so far as it is not cut down, it remains, by reason of the fact, not that it is expressly granted, but because the general right is only excluded in part.

But when it comes to a question of construction—and in my judgment it is in this case a question of construction—whether the right of subletting in part is preserved or not, then when you find, as in my opinion you do find here, something which is quite inconsistent with the reservation of such a right, then that right must be regarded as eliminated.

It seems to me, then, that one has to take this covenant as one finds it, and one finds that it is a covenant to use the premises for no other purpose than that of a private dwelling-house, and one finds, and it is not in dispute, that it has been used by the tenant, partly as a dwelling-house for her sub-tenant. That appears to me to be a plain breach of covenant, which is not rescued from being a breach of covenant by the conception to which I have referred, that she impliedly had the right to sublet that part of it.

As I say, I do not think that the cases on that topic to which we were referred, about the right to grant an assignment or to let a part of the premises, when the only covenant is a covenant not to part with the premises as a whole, have any bearing upon the matter at all. But in construing the relevant covenant as to user, which is said to have been broken, and which the judge found to have been broken, and which in my opinion was broken, one has the authority, as I think, of Eve J. in the case of *Barton* v. *Keeble*,[9] and of the observations of Atkin L.J. in *Berton* v. *Alliance Economic Investment Co. Ld.*[10] on the unreported case of *Berton* v. *London and Counties House Property Co.*,[11] for the view that the interpretation of that covenant of user is that to which I have referred and which the judge accepted in the court below.

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[7] [1951] 1 K.B. 752.

[8] [1902] 1 Ch. 727.

In my opinion the sub-demise by the original tenant to the sub-tenant was in breach of the covenant as to user, and the county court judge was right in so holding, and the appeal must be dismissed.

Harman J. The covenants in a lease must be construed by reference to the covenants which follow or precede them; thus where a covenant not to use otherwise than as a private dwelling-house is followed by a covenant against subletting a part without consent, you must construe the first by reference to the second; and that is all that Jenkins L.J. was really saying in the case of *Downie* v. *Turner*.[12]

It also follows, in my judgment, that where the covenant to use as a private dwelling-house is followed by a covenant not to sublet the whole, the inference is irresistible that there was no need in the second covenant to provide against subletting of a part, because that was already provided for in the covenant not to use otherwise than as a dwelling-house, scilicet, one single dwelling-house. That was pointed out by the Master of the Rolls during the argument, and it seems to me conclusive. In my opinion the county court judge was right.

Evershed M.R. I also agree that the construction adopted by the county court judge was the correct view of the provision against user otherwise than as a private dwelling-house. That such is the prima facie effect of such a covenant is, I think, in accordance with the law laid down by Eve J. in the case of *Barton* v. *Keeble*,[13] and in keeping with the observations of Atkin L.J. in the case of *Berton* v. *Alliance Economic Investment Co. Ld.*[14]

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[9] [1928] Ch. 517, 523, 524.

[10] [1922] 1 K.B. 742.

[11] The Times, May 19, Nov. 18, 1920.

[12] [1951] 2 K.B. 112.

[13] [1928] Ch. 517.

[14] [1922] 1 K.B. 742.

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I have been unable to accept the view that the basis of those decisions was that the underletting in those cases amounted to a use of the premises for business purposes. In my judgment departure from the prima facie meaning of the material words must depend upon particular words in a particular document: and that, for the reasons that my brothers have stated and which I do not repeat, I think was the case in *Downie* v. *Turner*,[15] upon which Mr. French mainly relied.

Appeal dismissed.

Solicitors: *Maples, Teesdale & Co., for Benning, Hoare & Drew, Luton; Large & Co.*

B. A. B.

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[15] [1951] 2 K.B. 112.

C. A.
1952
Oct. 30, 31.

Somervell, Jenkins and Hodson L.JJ.

WATSON *v.* BRITISH THOMSON HOUSTON CO. LD.

[1950 W. No. 2601.]

Factory—Woodworking machinery—Fencing—Circular saw—"Largest saw used on the bench"—Blades lessened in diameter through sharpening and re-gulleting—Woodworking Machinery Regulations, 1922 (*S.R. & O.* 1922, *No.* 1196), *reg.* 10 (*b*) (i), (ii).

By reg. 10 of the Woodworking Machinery Regulations, 1922, every circular saw is required to be fenced as follows: "Behind and "in a direct line with the saw there shall be a riving knife . . . "which shall conform to the following conditions: (i) The edge of "the knife nearer the saw shall form an arc of a circle having a "radius not exceeding the radius of the largest saw used on the "bench; (ii) The knife shall be maintained as close as practicable "to the saw . . . and at the level of the bench table the distance "between the front edge of the knife and teeth of the saw shall "not exceed half an inch."

The plaintiff workman, while operating a cross-cut saw in the defendants' factory, suffered the loss of parts of two fingers, and he sued the defendants for damages, alleging a breach by the defendants of their statutory duty under reg. 10. At the time of the accident a 24-in. saw (which was the largest saw for which the machine was intended and was being used) was in use, and the riving knife was set to correspond with the radius of a saw of that diameter. Owing, however, to re-sharpening and regulleting the diameter of the saw in use had been reduced to 19½ inches, and the radius of the riving knife being greater than that of the saw the gap between them was sufficiently greater to permit the workman's fingers to come in contact with the saw:—

Held, that reg. 10 contemplated that a bench might be used for saws of different sizes, without any breach of the regulation being committed, for it did not require that the radius of the arc formed by the riving knife should not exceed the radius of any saw at any particular time in use, but only that it should not exceed the radius of the largest saw used on the bench. The question therefore in each case was what was the largest saw used on the bench, and the answer being a 24-inch saw, there had been no breach of duty under the regulation.

Decision of Parker J. [1952] W.N. 230 affirmed.

Per Somervell L.J.: If the actual size of the saw at the time of any particular user is to be the test imposed by the regulation, then as, admittedly, all saws diminish in size as they are sharpened, every time that the largest saw in use on the bench becomes half an inch less in diameter there would have to be a new riving knife fitted to the saw. That would be a result which would be unexpected, having regard to the regulation as it is framed.

APPEAL from Parker J.[1]

The plaintiff, a sawyer, was employed by the defendants and was in charge of a cross-cut saw, which had a moving table, a fixed table, and, at the back of the saw, a riving knife. The curve of the riving knife followed the circumference of the saw blade and its purpose was to keep the two cut portions of wood apart and to act as a fence at the back of the saw to prevent the fingers or any part of the operator from coming into contact with the blade. To obtain the maximum degree of protection the riving knife had to be adjusted so as to remain as close as was practicable to the teeth of the saw. It was part of the plaintiff's duties to make this adjustment.

The machine, which was purchased new by the defendants in 1930, was capable of taking saws up to 24 ins. in diameter and was used for saws from 18 ins. to 24 ins. in diameter. When purchased two 24 in. blades were bought with it and used with it. In the course of time, as a result of resharpening and regulleting, the diameters of the saws became considerably less than when they were new, and at intervals 24 in. blade replacements were purchased for and used on the machine, but in the intervals between purchases the blades used on the machine would be of varying diameter and less than 24 ins. In 1948 the defendants ordered a further 24 in. replacement but, owing to market conditions, the new blade was not delivered until April, 1950, and was not put into use until some time later.

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[1] [1952] W.N. 230.

On March 13, 1950, the plaintiff, while operating the machine, found that a piece of wood had become jammed between a pillar and the riving knife, and when he put out his hand to remove it, it caught in the teeth of the saw, which was still revolving, and dragged his hand into contact with the blade. As a result the middle and index fingers of his right hand were severed through the middle phalanges.

Measurements taken of the machine the next morning showed that the diameter of the saw was 19½ ins., and that the radius of the circle of which the riving knife formed an arc was 12 ins. —that of a riving knife for a 24 in. saw. As a result the gap at table level between the riving knife and saw was under ½ in., but 4¾ ins. higher it was 1¼ ins. to 1⅛ ins.

The present action was brought by the plaintiff against the defendants for damages. He alleged negligence on their part in providing a system of work which was unsafe, in that the radius of the riving knife was 2¼ ins. greater than the radius of the saw blade, thus creating a gap between the riving knife and the edge of the saw so large that the plaintiff's fingers could and did enter that gap. Alternatively the plaintiff alleged that there had been a breach of the Woodworking Machinery Regulations, 1922, reg. 10.[2]

Parker J. gave judgment for the defendants. It could not, he held, be said that 24 in. saws were not used on the bench, in accordance with the regulations, merely because, for a time, they became of less diameter and for another time, owing to market conditions, replacements were not obtainable. The employers, having complied with the elaborate conditions of fencing could not, he said, be held in breach of a common law duty to supply proper plant or a safe system of working. He also found the plaintiff guilty of negligence.

The plaintiff appealed.

[2] Woodworking Machinery Regulations, 1922, reg. 10: "Every "circular saw shall be fenced as "follows:—. . . (*b*) Behind and in "a direct line with the saw there "shall be a riving knife, which shall ". . . conform to the following con- "ditions: (i) The edge of the knife "nearer the saw shall form an arc of "a circle having a radius not exceed- "ing the radius of the largest saw "used on the bench; (ii) The knife "shall be maintained as close as "practicable to the saw, having "regard to the nature of the work "being done at the time, and at the "level of the bench table the dis- "tance between the front edge of the "knife and teeth of the saw shall not "exceed half an inch."

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Houston
Co. Ld.

Felix Denny for the plaintiff. The test to be applied under the regulation is the actual diameter of the saw at the time of any particular user, and therefore the defendants were in breach of their statutory duty. If the radius of the saw in actual use is substantially less than the radius of the riving knife it is immaterial that they were originally the same.

M. Berryman Q.C., *John Bassett Q.C.* and *M. J. Anwyl Davies*, for the defendants, were not called on.

Somervell L.J., having stated the facts and read reg. 10 of the Woodworking Machinery Regulations, 1922, continued:— At the time of the accident the saw which was actually being used was some 19½ inches in diameter and the radius of the riving knife was 12 inches. It is said, therefore, there was a breach of the regulation. The effect of the radius of the riving knife being larger than the radius of the saw is that as you get up above the table level the gap, instead of remaining at half an inch, which it would be if their radii were the same, increases.

One thing which I think is important in construing and applying reg. 10 is to note that it contemplates that a circular saw may be used when its radius is less than that of the riving knife. It is unnecessary to speculate on the reason, but it would appear either that this gap which I have referred to was not thought to create any appreciable danger, or it was difficult or impracticable to arrange that there should be riving knives of different radii when saws of different radii were being used. Mr. Denny, for the plaintiff, admitted (and I do not think there could be any dispute about it) that there would be no breach of this regulation if, say, on Mondays, Wednesdays and Fridays a 24-inch saw was used, and on Tuesdays and Thursdays an 18-inch saw was used with a riving knife of 12-inch radius although, of course, with an 18-inch diameter saw the gap above table level would be somewhat greater than it was in the present case. In other words, the danger, such as it was, which actually arose in the present case, is one which the regulation contemplates may arise, and the question is whether the circumstances of this case are the circumstances contemplated by the regulation.

The judge considered the construction of those words. The facts to which he had to apply them may be summarized as follows: The blades which were originally supplied long ago with this saw were 24-inch blades. There was no complete history of all the blades which had been ordered in between, but it was clear that 24-inch blades had been ordered on, at any rate, one occasion. It was clear that a 24-inch blade had been ordered in 1948 and was on order at the time of the accident, and the judge was, I think, entitled, on the evidence, to come to the conclusion that these defendants used 24-inch blades on this saw and that the blade in fact being used had started life as a 24-inch saw but it, and two others being used at the time, had diminished in size with repeated sharpening. On that evidence, and in those circumstances, the judge said this: "I am satisfied that "wherever the history of the purchases of replacement can be "proved it shows purchases of 24-inch saws, and I think I am "entitled to infer, on the evidence, that when the blades were "replaced, they were replaced by 24-inch blades. In the interval "between purchases the blades, no doubt, would be of varying "diameters from time to time, going down, as I think they did "in this case, from 24 inches to the 19½ inches of the blade at "the time of the accident, but it does not seem to me that it "can be said that 24-inch saws were not used on the bench "within the meaning of that regulation merely because, for a "time, they became of less diameter and for another period of "time (albeit a long time owing to market conditions) a 24-inch "replacement was not obtainable. Accordingly, I do not think "that, in this case, there has been any breach of the regulations."

I think that was a right conclusion, and the only point I wish to add to what I have already said is that if Mr. Denny is right, and the actual size at the time of any particular user is to be the test imposed by the regulation, then, as admittedly all saws diminish in size as they are sharpened, every time that the largest saw in use becomes half an inch or one inch less in diameter than when it started there would have to be a new riving knife fitted to the saw. That, I think, would be a result which would be unexpected, having regard to the regulation as it is framed and as I sought to analyse it earlier in this judgment. If we had been in favour of the plaintiff on that point there were other points which Mr. Denny wished to argue, but in the view I have taken they do not arise and I would dismiss the appeal.

JENKINS L.J. I agree. Regulation 10 (*b*) (i) does not say that the radius of the arc formed by the riving knife shall not exceed the radius of any saw at any time used on the bench. It says that that radius shall not exceed the radius of the largest saw used on the bench, so that the regulation clearly contemplates that a bench may be used for saws of different sizes but will, nevertheless, be complied with, so far as subparagraph (*b*) (i) is concerned, if the radius of the arc formed by the riving knife does not exceed that of the largest saw used on the bench. The question, therefore, is, in each case, what is the largest saw used on this bench? In my view, on the facts of this case, the fair answer to the question would be that the largest saw used on this bench is a saw of 24 inches in diameter. I agree that the appeal fails on the construction of the regulation alone.

HODSON L.J. I also agree and have nothing to add.

Appeal dismissed.

Solicitors: *Rowley, Ashworth & Co.; Stuart H. Lewis.*

A. W. G.

REGINA *v.* WILSON AND OTHERS. *Ex parte* PEREIRA.

1952
Oct. 8.

Lord Goddard C.J., Finnemore and McNair JJ.

Bastardy—Child born in Gibraltar—Mother a British subject domiciled in Gibraltar—Affiliation proceedings not maintainable in this country—Bastardy Laws Amendment Act, 1872 (35 *&* 36 *Vict. c.* 65)*—Maintenance Orders Act,* 1950 (14 *Geo.* 6, *c.* 37), *s.* 27 (2).

The mother of a bastard child born in Gibraltar was a British subject then domiciled in Gibraltar:—

Held, that the Maintenance Orders Act, 1950, had not altered the jurisdiction of English courts in such a case, and the mother was not entitled to a summons in bastardy against the father of the child as at the time of its birth she was not domiciled in this country.

O'Dea v. *Tetau* [1951] 1 K.B. 184 applied.

APPLICATION for an order of mandamus.

On July 15, 1950, a bastard child was born in Gibraltar to the applicant, Emilia Pereira, a single woman who was a British subject domiciled and resident in Gibraltar. She later came to reside in England and on January 25, 1952, applied to the metropolitan magistrate sitting at the south-western police court for a summons in bastardy to be issued against Ralph Kershaw, an Englishman, whom she alleged to be the father of her child. After considering *Regina* v. *Blane* [1] and *O'Dea* v. *Tetau* [2] the magistrate refused to issue a summons because the child was born at Gibraltar of a mother who was at that time domiciled in Gibraltar.

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[1] (1849) 13 Q.B. 769.

[2] [1951] 1 K.B. 184.

The grounds of the application for an order of mandamus requiring the magistrate to issue a summons were that the magistrate had been wrong in law in holding that he had no jurisdiction, because section 27 (2) of the Maintenance Orders Act, 1950,[3] enacted that the jurisdiction conferred by the Bastardy Laws Amendment Act, 1872, on a court in the United Kingdom should be exercisable notwithstanding that the bastard child was not born in that part of the United Kingdom where the court was; and because in the cases cited to the magistrate the child was born of a foreign woman domiciled in a foreign country, whereas the applicant's child was born of a British woman domiciled in Gibraltar.

D. H. W. Vowden for the applicant mother. It is submitted that the applicant, a British subject now residing in this country, is entitled to issue a summons. *Regina* v. *Blane*[4] and *O'Dea* v. *Tetau*[5] were both cases where the mother was a foreign woman and the child was born out of the jurisdiction, and *O'Dea* v. *Tetau*[5] is distinguishable from the present case where, although the child was born out of the jurisdiction, the mother was a British subject who has now, it is submitted, acquired a domicile of choice in England.

If the Maintenance Orders Act, 1950, is not confined in its application to Scotland and Northern Ireland but applies generally to places outside the United Kingdom, section 27 (2) assists the applicant by providing that the jurisdiction conferred by the Bastardy Laws Amendment Act, 1872, on a court in one part of the United Kingdom shall be exercisable although the bastard is not born in that part of the United Kingdom. It is to be noted that section 3 of the Act of 1872 makes no mention of the case of a child born out of the jurisdiction, but merely refers to the place where the mother resides.

It is submitted that *Reg.* v. *Blane*[6] should be viewed in the

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[3] Maintenance Orders Act, 1950, s. 27 (2): "It is hereby declared that "any jurisdiction conferred by Part I "of this Act, or any enactment "therein referred to, upon a court in "any part of the United Kingdom "is exercisable notwithstanding that "any party to the proceedings is not "domiciled in that part of the United "Kingdom; and any jurisdiction so "conferred in affiliation proceedings "shall be exercisable notwithstanding "that the child to whom the proceedings relate was not born in that "part of the United Kingdom."

[4] 13 Q.B. 769.

[5] [1951] 1 K.B. 184.

[6] 13 Q.B. 769.

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light of the changed circumstances since that decision was given; at that time a bastard was chargeable to a particular parish, whereas today the responsibility rests on the taxpayers of the country as a whole. A decision which covers the present circumstances is *Rex* v. *Humphrys; Ex parte Ward*,[7] in which the court granted an order to an Englishwoman who went abroad for the birth of her child and then returned to this country.

[LORD GODDARD C.J. But there the man and woman were both domiciled in England and subject to English law, whereas the status of the applicant's child should be governed by the law of Gibraltar. Domicile, not nationality, is surely the test where questions of status are concerned.]

D. Fitzgerald for the respondent, Ralph Kershaw, was not called on.

LORD GODDARD C.J. I think that it is unnecessary to say more than that the case of *O'Dea* v. *Tetau*[8] is an authority which completely justifies the magistrate in the view which he took. That case followed *Reg.* v. *Blane*,[9] a case which was decided as long ago as 1849, and which has never been overruled, although there has been a good deal of legislation with regard to bastardy since that date. So, too, since the decision in *O'Dea* v. *Tetau*[10] in 1950, the Maintenance Orders Act, 1950, has been passed, and that decision must have been in mind, at any rate in one House of Parliament. We gave our decision in *O'Dea* v. *Tetau*[10] on July 24, 1950, and the Maintenance Orders Act, 1950, was passed on October 26 of that year, so there would have been time, had the legislature desired it, to reverse that decision and perhaps to deal with it in that Act; though, for myself, I think that had that been done, objection might have been taken that it was outside the long title to that Act, which is "An Act to enable certain "maintenance orders and other orders relating to married persons "and children to be made and enforced throughout the United "Kingdom." I think that the Act is concerned only with such matters as a maintenance order made in England being enforced in Scotland, or one in Scotland being enforced in Northern Ireland. I do not think that the law is in any way altered by that Act.

That being so, it seems to me that *O'Dea* v. *Tetau*[10] applies because there the ratio was not the nationality of the parties but the fact that the child was born out of England in another jurisdiction, and that the mother was domiciled at the time of the birth in that jurisdiction.

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[7] [1914] 3 K.B. 1237.

[8] [1951] 1 K.B. 184.

[9] 13 Q.B. 769.

[10] [1951] 1 K.B. 184.

Rex v. *Humphrys; Ex parte Ward* [11] conflicts to some extent with *Reg.* v. *Blane*,[12] which we followed in *O'Dea* v. *Tetau*,[13] but in *Rex* v. *Humphrys* [14] both the putative father and the mother were domiciled in England, and were domiciled in England when the act of conception took place. The facts were that a domiciled English woman had gone abroad for the birth of the child and at once came back to this country, and the court drew a distinction between those facts and the facts in *Reg.* v. *Blane*.[15] Bankes J. said [16]: "If the facts proved before the "magistrates show that the status of the child is governed by "some foreign law so that the fulfilment of the condition "precedent cannot be proved without recourse to foreign law, "then no doubt the case would fall within the principle of *Reg.* "v. *Blane* [17]; but in the absence of such evidence it is not the "law, and *Reg.* v. *Blane* [17] does not decide, that in the case of "a bastard child of English parents the mere fact that the child "is born abroad bars bastardy proceedings." The mere fact that the child of a mother in this country is born abroad does not bar proceedings; but at the time the child in question was born the mother was domiciled abroad: whether she has changed her domicile or not is another matter. She now says that she is resident in this country and intends to stay here, but the evidence of domicile is sketchy to a degree and not such as the court would accept as a change of domicile, but we need not decide that question because undoubtedly at the time the child was born the mother was domiciled in Gibraltar. The magistrate was therefore right in refusing to issue a summons, and this application fails.

FINNEMORE J. I agree. As I understand Mr. Vowden's argument, he tried to distinguish this case from the cases which have been cited on the ground that in those two cases the mother was in fact a foreigner, in the one case a German and in the other a French woman; but it seems to me that that was not the ratio decidendi. The important thing was that at the time of the birth the mother was domiciled out of the country, and in the present case it is accepted that she was at the time of the birth domiciled in Gibraltar and that the child was born in Gibraltar. It is, therefore, quite different from *Rex* v. *Humphrys*,[18] in which the majority decision was that where the mother was still domiciled in England but happened to be away when the child was born, that was not necessarily a bar to proceedings in this country under the bastardy laws. In a case where the mother at the time of the birth is domiciled elsewhere, it seems to me that the case is one which cannot be dealt with in the courts of this country under the bastardy laws, and the magistrate was right in refusing jurisdiction.

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[11] [1914] 3 K.B. 1237.
[12] 13 Q.B. 769.
[13] [1951] 1 K.B. 184.
[14] [1914] 3 K.B. 1237.
[15] 13 Q.B. 769.
[16] [1914] 3 K.B. 1237, 1240.
[17] 13 Q.B. 769.

McNAIR J. I agree. I think that the case is quite clearly covered by the authorities which have been referred to by my Lords. I was at first disposed to think that the law might have been changed by section 27 (2) of the Maintenance Orders Act, 1950, which received the Royal assent some three months after the decision in *O'Dea* v. *Tetau*[19] had been given; but on reconsideration I think that it is possible to read the concluding words of that subsection in a more limited sense as concerned only with a case where the child has been born in some part of the United Kingdom.

Application refused.

Solicitors: *R. W. Platt; T. D. Jones & Co., for George Clough & Willis, Bury, Lancashire.*

S. C.

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[18] [1914] 3 K.B. 1237.

[19] [1951] 1 K.B. 184.

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1952
Oct. 27, 28.

Evershed M.R.,
Denning and
Romer L.JJ.

RIMMER *v.* RIMMER.

[Plaint No. H. 55.]

Husband and wife—House purchased for home—Proportions of payment of price—Wife afterwards turned out of house—House sold by husband for large sum—Wife's claim to share—Division in equal shares—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

The parties were married in 1934 and on September 30, 1935, a home was purchased for the sum of £460, the wife paying £29 and

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the husband providing the balance of £431 by means of a mortgage of the house to a building society. The husband and wife were both wage earners and the husband paid part of his weekly earnings to his wife towards the housekeeping. In May, 1942, the husband joined the merchant service and afterwards made allotments to his wife of £3 10s. a week, soon after increased to £4. The wife, out of this allowance, made payments on behalf of the husband to the building society in repayment of capital amounting to £151, and between 1944 and 1946 the wife out of her own earnings made capital payments amounting to about £280 with the result that the mortgage was redeemed.

Soon after the end of the war the husband returned home but in October, 1951, he deserted his wife and early in 1952 he sold the house for £2,117.

The wife then applied under the Married Women's Property Act, 1882, s. 17, for a share of the sum realized. Differing amounts were awarded to her by the registrar of Southport county court and the county court judge. On appeal:—

Held, that in all the circumstances it would be fair and just that the sum realized on the house, which was so largely a windfall, should be divided between the husband and wife equally.

In re Rogers' Question [1948] 1 All E.R. 328 distinguished. *Jones* v. *Maynard* [1951] Ch. 572 approved.

APPEAL from Judge Brown sitting in the chambers of Southport county court.

The plaintiff, Ada Rimmer, was the wife of the defendant, Thomas Pennington Rimmer. They were married in 1934 and on September 30, 1935, the purchase was completed of 51 Stafford Road, Southport, as their home for the sum of £460, of which £29 was provided by the plaintiff and the balance of £431 provided by an advance to the defendant from the Burnley Building Society on a mortgage by him of the house. The defendant was employed as a jobbing gardener at average weekly earnings of £3 10s. 0d., gradually increasing, until in May, 1942, he joined the Merchant Navy. He had originally paid his wife for housekeeping £2, which gradually increased, and after he joined the merchant service he made allotments to his wife of £3 10s. 0d. a week, increased to £4 a few months later. The plaintiff was at all times working and at this time earning £3 10s. 0d. a week and, out of the housekeeping allowance, made payments on behalf of the defendant to the building society in repayment of capital £150 11s. 7d.; and during the years 1944 to 1946 the plaintiff, out of her earnings, made capital payments amounting to £280 7s. 5d., with the result that the mortgage was fully paid off.

After the defendant was released from the merchant service he continued to live at home for a time, but left the house and deserted the plaintiff in October, 1951. The plaintiff remained there until the end of January, 1952, when the defendant turned her out and took possession of the house, which he sold for the sum of £2,117 15s. 2d.

In these circumstances the plaintiff applied under the Married Women's Property Act, 1882, s. 17, for a share of this sum. The matter came before the registrar of Southport county court, who decided that the division between the plaintiff and defendant should be in proportion to their capital contributions to the purchase of the house, being £309 7s. 5d. by the plaintiff and £150 13s. 7d. by the defendant. In the result the plaintiff was entitled to £1,423 10s. 0d. and the defendant to £693 10s. 0d.

The county court judge, however, held that the sum was divisible in the proportion of the original contributions to the purchase price, the sum advanced by the building society being treated as the defendant's contribution. He therefore held that the plaintiff was only entitled to £133 9s. 8d., but with an addition of £280 7s. 5d. representing capital payments made by the plaintiff in reduction of the loan from the building society.

The plaintiff appealed.

W. G. O. Morgan for the wife. The wife's contention is that the husband holds these premises as trustee for her and she supports the view of the registrar that the husband and wife share the property in proportion to the contributions they respectively paid. The county court judge was wrong in trying to find an implied agreement between the husband and wife as to the proportions in which they should share in this property resulting from their original contributions, the loan from the building society being treated as that of the husband. *In re Rogers' Question* [1] was a different case. There the wife made it clear that she would not pay more than her initial deposit of £100. Here the wife did not limit her contribution to the deposit of £29. In the end she paid off the mortgage, having paid twice as much as the husband. [He referred to *Hoddinott* v. *Hoddinott.*[2]]

It cannot have been the parties' intention that the wife's interest should be limited to the proportion which her deposit of £29 bore to the whole purchase-money. The mortgage was discharged out of the parties' respective earnings and it may be that the correct approach is that of Vaisey J. in *Jones* v. *Maynard*[3] and they should share the proceeds of sale equally.

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[1] [1948] 1 All E.R. 328.

[2] [1949] 2 K.B. 406.

Melville Kennan for the defendant. It is contended that the plaintiff, as the defendant's wife, was fully repaid under the county court judge's order, seeing that she was only able to apply £280 towards paying off the mortgage on the house, by reason of the large weekly sums allotted to her by the defendant during the last world war. Apart from that she was earning £3 10s. 0d. a week herself. She could perfectly well have maintained herself on that and accumulated the sum of £280 out of the £4 a week, for a time £4 10s. 0d., allotted to her by the defendant. The judge, however, took the view that she had used the sums allotted to her for living on. But it was only by the allotments to the plaintiff, even viewed as housekeeping money, that the payment of £280 was made possible. The judge thought that *In re Rogers' Question*[4] applied and that what the defendant provided should be regarded as going to pay off the mortgage.

[EVERSHED M.R. I do not think that case so provided.]

Here the position is that the wife contributed £29 originally towards the purchase and that the husband must be treated as paying the rest by obtaining a loan on mortgage since paid off. The view that the wife found the sum of £280 towards paying off the mortgage must be regarded with great doubt. On the uncontradicted evidence there was no agreement to vary the position from what it was when the house was bought. If the position was to be regarded as different under section 17 of the Married Women's Property Act, 1882, the defendant must be treated as having assigned an equitable interest to his wife, the plaintiff. Why should the position be treated as changing so as to enable the court to say that the plaintiff and the defendant must share equally? It was only when the plaintiff paid the sum of £280 that the position could have been said to alter, but, as already pointed out, there is little ground for treating that sum as found more by the plaintiff than the defendant.

W. G. O. Morgan in reply.

EVERSHED M.R. This appeal is another illustration of the difficulties with which a court is confronted in trying to do justice, as enjoined by the Married Women's Property Act, 1882, s. 17, between a husband and wife as regards some item of property when their marriage has unfortunately come to grief. Mr. Kennan, for the husband, has intimated (and I doubt not rightly) that our judgment in this case may be regarded as a source of guidance (but perhaps also of confusion) for other judges before whom similar cases may come. I am most anxious that what I say shall not confuse, but, if possible, shall guide; and for that reason we have taken the opportunity of some discussion together upon the way in which the judgment should be formulated.

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[3] [1951] Ch. 572.

[4] [1948] 1 All E.R. 328.

The facts of the case are in some degree peculiar, as they will generally be found to be in all these cases; but in this year 1952 it is undoubtedly a common feature of such cases that, owing to the great rise in values in house properties, what is the real question in issue between the parties is in large measure in regard to the division of what may be regarded as a windfall. I emphasize that point because perhaps in 10 years' time the situation will be quite different. I am therefore anxious that what falls from the court on this occasion should not cause trouble hereafter in the application of this judgment to circumstances which may be quite different. That is to say perhaps no more than the obvious, namely, that in all cases of this kind the result must depend on the particular facts in the particular case.

One other observation may be made that is no less obvious. As I ventured to observe in *In re Rogers' Question*[5] (a case in which a sentence of mine has been relied on by the registrar and the county court judge in arriving at diametrically opposite conclusions): "When two people are about to be married and are "negotiating for a matrimonial home it does not naturally enter "the head of either to inquire carefully, still less to agree, what "should happen to the house if the marriage comes to grief. "What the judge must try to do in all such cases is, after seeing "and hearing the witnesses, to try to conclude what at the time "was in the parties' minds and then to make an order which, "in the changed conditions, now fairly gives effect in law to "what the parties, in the judge's finding, must be taken to have "intended at the time of the transaction itself." In a sense, therefore, the court is proceeding to decide a question on a hypothesis which really does not exist. Certainly in this case it is clear that there never was any agreement between the husband and the wife, in the ordinary sense of the term, when the house in question was bought. As Atkin L.J. observed in a well-known case, the ordinary incidents of commerce have no application in the ordinary relations between husband and wife.

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[5] [1948] 1 All E.R. 328.

It is appropriate to remember what it is that the Act calls on the court to do. The relevant part of section 17 says: "In any "question between husband and wife as to the title to or posses-"sion of property, either party . . . may apply by summons or "otherwise in a summary way to any judge of the High Court "of Justice in England or in Ireland . . . who may make such "order with respect to the property in dispute, and as to the "costs of and consequent on the application, as he thinks fit." So the problem posed is, in the present case, what order is now a fit order to make in regard to a sum of £2,117, being the proceeds of sale of a house which was the matrimonial home?

That is the problem, and in regard to it I venture to take as my guide or test the observations of a wise judge, Bucknill L.J., in a case which I think is not reported, of *Newgrosh* v. *Newgrosh*,[6] decided on June 28, 1950. Bucknill L.J. said: "That"—and he referred to the citation I have just made—"gives the judge "a wide power to do what he thinks under the circumstances "is fair and just. I do not think it entitles him to make an "order which is contrary to any well-established principle of "law, but, subject to that, I should have thought that disputes "between husband and wife as to who owns property which at "one time, at any rate, they have been using in common are "disputes which may very well be dealt with by the principle "which has been described here as 'Palm Tree Justice.' I "understand that to be justice which makes orders which appear "to be fair and just in the special circumstances of the case."

Without a long recital of all the facts in this case, the vital circumstances are these: The husband and wife were both wage earners who, after marriage in the year 1934, bought the house in question. Its price was £460, now risen to £2,117, and representing a windfall therefore for one or both of some £1,500 or more. At the time of the purchase it was necessary that £29 should be provided in cash, and the whole of the rest of the price was advanced by a building society on the usual building society mortgage. In fact, the wife provided the whole of the sum in cash, £29. The property was then conveyed to the husband alone, and he alone executed the mortgage. It is, I think, common knowledge that a building society will in any case be more inclined, to say no more, to have the husband as the mortgagor than the wife. However that may be, during the years that ensued until the outbreak of the late war, certain payments off were made by the husband. It appears that no reckoning has been made of any interest payments, and I shall therefore exclude them; and, for simplicity, I shall use round figures. During the period I have mentioned, the husband paid off £151. On the outbreak of war, after an interval, the husband joined the merchant service and was away on that service until after the war had ended. During that time he sent certain weekly sums to his wife which the registrar has found as a fact were not more than sufficient to maintain the wife, save by a margin which is not really relevant; so that they were not sufficient to provide sums for discharging further capital payments on the mortgage. During that period of the husband's absence, and in particular between the years 1944 and 1946, the wife (as has been found as a fact) out of her own private resources discharged the remainder due in respect of principal on the mortgage, namely, £280, making with the £151 paid by the husband a total of £431. The husband returned and resumed life with his wife at the house in question until October, 1951, when they parted company.

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[6] Unreported.

I think that one other fact is material. It appears that during the time of their married life together substantial quantities of furniture were acquired and, as has been found (and there is no appeal on this matter), the furniture was in fact contributed by the wife out of her resources.

On those facts, the question was tried out before the registrar, who heard the evidence of the two parties and of another witness. He concluded that the just result on those facts was that the sum in question should be divided between husband and wife in direct arithmetical proportion to the contributions in fact made; that is to say, the husband having paid £151 and the wife altogether £309, the proceeds were divided roughly (though the figure awarded was, of course, accurately calculated) in the proportions of 1 to 2 as between husband and wife, and that gave the wife a sum of £1,423 out of the proceeds. The matter then was taken by the husband on appeal to the county court judge, who, on the same facts, came to a different conclusion. He thought that the proper beneficial interests must be treated as having been determined at the date of the purchase. He, therefore, came to the conclusion that the wife having contributed in cash £29 and the husband having made himself liable for the rest of the purchase money (being therefore, as he said, in the same position as though he had contributed the remaining £431 in cash), their shares were fixed in the proportions roughly of

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3 to 40, or, more accurately, 29 to 431, subject to the wife being given, in addition, by way of recoupment, the sum of £280 she had contributed in discharge of the mortgage. The method of dealing with the matter gave to the wife a total sum of £414, approximately.

The wife has now appealed to this court, and by way of emphasizing the great difficulties of cases of this kind and the pitfalls into which a judge may fall in expressing any matters of principle, it is to be noticed that in arriving at their different conclusions both the registrar and the judge purported to follow what is stated in another sentence of mine in *In re Rogers' Question*,[7] which is as follows: "In his view"—that is, Roxburgh J.'s view, in *In re Rogers' Question* [7]—"the effect of "the evidence of the so-called tiff was to support, or, at least, "not to contradict, the conclusion that each must be taken to "have contributed to the purchase in the proportion in which "they did, in fact, contribute or (in the case of the husband) "make himself liable to contribute." The registrar interpreted that observation as guiding him to hold here that, the contributions having been in fact, as I have stated, £309 by the wife and £151 by the husband, in those proportions the total proceeds must be shared. That view is, I think, open to the criticism that it took no account of the fact stated in the passage I have read (a fact present also here) that the husband in fact had made himself, by executing the mortgage, solely liable to the building society. The judge applied the same sentence and treated it as guiding him to hold that the date at which the determination must be made was the date of the purchase and holding (as he did) that the execution of the mortgage was equivalent to payment in cash, the proportions were 29 to 431. That in turn, in my judgment, is open to the criticism that in this case the execution of the mortgage was not equivalent to payment in cash. He paid on the occasion in question no cash whatever and, as I have already said, the mortgage was in fact discharged unequally as between the wife and husband, the former paying considerably more than the latter.

Let me say that the exercise of picking holes in the reasoning of other judges or tribunals who have reached conclusions is much easier than that of arriving at a conclusion oneself supported by reasoning which is not in its turn open to challenge. Still, in what I think is a proper compliance with the directions in section 17 of the Act of 1882, my judgment is that the proper answer in this case is that both parties ought to share equally the proceeds of this sale. If it be possible to formulate the principle to be applied in a sentence, I think that in each case the question is, on all the facts of the case, what is the fair and just answer to be given to the question posed, having regard not merely to what occurred at the time when the property was originally purchased but also having regard to the light which the conduct of the husband and wife throws on their relationship as contributors to the acquisition of the property which was their joint matrimonial home? In some cases it may well be that the amounts which they respectively contributed ought to conclude the question of the shares in which they should partake in the proceeds. Thus, to take for the moment an imaginary case, if there was nothing else before the court save that a wife put up (say) £x in cash when the property was bought and the husband undertook to discharge solely, as in fact he did, the obligation to pay all the rest, then the court could conclude (though I do not say it must) that those shares ought to fix their beneficial interests respectively. In *In re Rogers' Question* [8] there was an additional fact, namely, that the wife had intimated quite plainly, as the judge found, that the amount of her original contribution was the total she was prepared to contribute. But the facts in this case are different, and I do not think that the actual sums contributed ought to fix the shares. I think so to hold over-emphasizes the accident of the precise figures which they happened to contribute, more particularly since during the years from 1942 to 1946 the husband was serving abroad and disabled in any case from taking any active part in dealing with the building society. Here the facts were that the wife acquired the furniture, that she not only paid sums in discharge of the mortgage out of her private resources, but conceived it was within her province so to do; and there was also the fact that here was a childless marriage and that both parties were substantially throughout the period in question wage earners. All this leads to the conclusion that a fair division of the proceeds, consisting so largely as they do in this case of what I have called a windfall, is that they take them equally. Put another way, it leads justly to the conclusion that the court can and should decide that the husband, although he held the sole legal title, held it on behalf of both of them as a joint home and, there being no other evidence which would precisely quantify the shares, held it therefore for them equally.

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[7] [1948] 1 All E.R. 328, 329.

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[8] [1948] 1 All E.R. 328, 329.

I appreciate that to fall back on what may be called a Solomonesque judgment is perhaps, as Mr. Kennan said, to yield to the obvious temptation to shirk more difficult computations. But I do not think that is a just criticism of the conclusion at which I have arrived. Where the court is satisfied that both the parties have a beneficial interest, and a substantial beneficial interest, and where it is not possible or right to assume some more precise calculation of their shares, equality, I think, almost necessarily follows. Vaisey J., for example, in *Jones* v. *Maynard*,[9] rightly in my judgment applied that reasoning, and I think that an analogous application of the same reasoning was adopted by this court when the question of beneficial ownership of a copyright was considered in *In re Dickens*.[10] Maugham L.J. said: "In "these circumstances, my opinion is that part of the sum realized "properly belongs to the estate of Sir Henry Dickens and part "to the estate of Charles Dickens. There are no materials for "apportioning the sum otherwise than in equal shares between "the two estates; and that is, in my opinion, the proper con"clusion, not only because, according to the language of Lord "Somers, . . . 'equity did delight in equality,' but also because, "in the exceptional circumstances of the present case, the two "contending parties have equal rights to share in the proceeds "of sale." I venture to apply that reasoning to this case, for I think it applicable.

I conclude by emphasizing the point that, in the year 1952, we are concerned with a property which has, by the accident of things, produced so great a windfall for the two parties that it is a question what is a just division of the proceeds, including that large windfall. If in future years that particular characteristic ceases to be common, it may well be (though nothing that I have said should stand in the way of a court reaching whatever conclusion might appear just in all the particular circumstances) that a court would place greater emphasis than I have thought it right to do on the actual contributions which, in otherwise similar circumstances, a husband and wife might have made towards the acquisition of a property; but, on all the facts and in all the circumstances of this case, I think it would be wrong to attach to the accident of the precise figures contributed the consequence that the beneficial interests must be arithmetically related to the sums contributed.

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[9] [1951] Ch. 572.

[10] [1935] Ch. 267, 309.

I therefore think, with all respect to the county court judge and to the registrar, that the proper answer to the question posed is, as I have said, that the husband and wife should share equally in these proceeds. I think, therefore, that this appeal should be allowed and that this declaration should be substituted for the one which commended itself to the judge.

DENNING L.J. [after stating the facts]:—In 1882, when Parliament declared that a wife was entitled to have property of her own, it enacted that in any question between husband and wife as to the title to or possession of property, the court was to decide the matter as it thought fit. Parliament laid down no principles for the guidance of the courts, but left them to work out the principles themselves. That is being done. In cases when it is clear that the beneficial interest in the matrimonial home, or in the furniture, belongs to one or other absolutely, or it is clear that they intended to hold it in definite shares, the court will give effect to their intention: see *In re Rogers' Question* [11]; but when it is not clear to whom the beneficial interest belongs, or in what proportions, then, in this matter, as in others, equality is equity. In *Newgrosh* v. *Newgrosh* [12] some furniture was bought by the husband's father with his own money for the use of the couple, but the receipt was taken in the wife's name. Willmer J. held that the furniture belonged to them jointly, and his decision was affirmed by this court. In *Jones* v. *Maynard* [13] a banking account was in the husband's name but was fed by the moneys of both and treated as a joint account. Vaisey J. held that, although the husband's contributions were much larger than the wife's, it belonged to them both jointly.

In this case I look on the money which was paid by the wife to the building society as money saved by their joint efforts and applied for their common benefit. I do not regard the sum of £280 as wholly the wife's money. She, no doubt, regarded it as her money because it came out of her own earnings, but it must be remembered that she was keeping herself all the time on her husband's money. The wife here, like many wives, managed the family income. She in fact used the husband's money to pay the housekeeping expenses and saved her own money. But she might equally well, and with more justice, have paid some of the housekeeping expenses out of her own money and saved a corresponding amount of the husband's money. If she had done that, some of the husband's money would presumably have gone to make up the £280 to repay the building society. Whilst they were living together, of course, it did not matter. The important thing was to pay off the mortgage and it did not matter out of whose money it was paid. When they separate, years afterwards, the husband must be given some credit for the £280, seeing that it was only by using his money for housekeeping that she was enabled to save so much of her own. It was really saved by their joint efforts, and not by hers alone; and it was applied for their common benefit. The proceeds of it should therefore belong to them both jointly. It is rather like the case when the husband only goes out to work and the wife looks after the house. If she manages to save money out of the housekeeping allowance sufficient to buy furniture for the home, which is intended to be a continuing provision for them both, then that furniture does not belong to her absolutely, even though it is bought in her name; nor does it belong absolutely to the husband, even though he provides the housekeeping allowance. It is the result of their joint efforts and is presumed to belong to them jointly. I would refer in this connexion to what I said in *Hoddinott* v. *Hoddinott*,[14] where I do not think there was any difference on the law but only on the facts. Indeed, in view of the later cases the decision itself might be different today.

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[11] [1948] 1 All E.R. 328.

[12] Unreported.

[13] [1951] Ch. 572.

Again I do not regard the husband's obligation to pay £431 as being equivalent to a contribution by him of £431. It seems to me that when the parties, by their joint efforts, save money to buy a house, which is intended as a continuing provision for them both, then the proper presumption is that the beneficial interest belongs to them both jointly. The property may be bought in the name of the husband alone, or in the name of the wife alone, but nevertheless if it is bought with money saved by their joint efforts, and it is impossible fairly to distinguish between the efforts of the one and the other, then the beneficial interest should be presumed to belong to them both jointly. That is this case. I agree with my Lord that the proper presumption in regard to this house was that it was held jointly and the beneficial interest should be divided equally between them. The appeal should be allowed accordingly.

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[14] [1949] 2 K.B. 406, 416.

ROMER L.J. I agree, and only add a word or two because this class of case is one, I think, of very considerable importance to the people of this country. I know myself that there have been a large number of these cases in recent years, and it may well be that there will be many others in future. I think the judgment of the county court judge is open to criticism only in this, that he approached the problem before him in rather too strict a way, in that he applied legal principles which, although perfectly right and accurate in a dispute as between strangers, require modification as between a husband and wife when the subject of dispute is the ownership of what was the matrimonial home. In effect he held, as would certainly follow had this been a case as between strangers, that the wife's contribution to the building society's mortgage resulted in her being subrogated pro tanto to the society's rights; in other words, that by reducing the debt she took over to the extent of her contributions the security which the building society had. I do not think that is the result which can properly be reached in the light of the whole of the circumstances of this case.

There are one or two points which must be borne in mind. The first, which fundamentally distinguishes this case from *In re Rogers' Question*,[15] is that in the present case neither husband nor wife specified or limited in any way or at any time their intended contribution to the home, whereas in the *Rogers'* case [15] the wife apparently made it quite plain that her contribution was to be limited to £100. The second point, which I think worthy of consideration, is that the payment by the wife of the initial deposit of £29 seems to indicate a common intention that she was to have some beneficial interest in the home and was not merely to be treated as a lender to the husband of that amount; and if the intention ("belief" I suppose is a better word than "intention," because I do not suppose they formed an actual intention) was that she was to have a beneficial interest in the home, it is improbable in the extreme that her interest was to be finalized as being in the proportion which £29 bore to the then value of the house. Further, it is to be observed that when the husband came to hold the property free from the mortgage, he did not then or, as far as I know, at any other time, make any suggestion of paying the sum of £29 back or of giving his wife any security for it. Thirdly, why did the wife lay out the sum of £280 in paying off the building society? It seems to me inconceivable that she paid it for the purpose of getting an investment, namely, part of the building society's mortgage. The obvious answer is that she made this contribution to the purchase of what was and what she hoped would continue to be the home of herself and her husband, just in the same way that she made her contribution to the furniture for the home.

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[15] [1948] 1 All E.R. 328.

So much for the circumstances, apart from the actual contributions which she made of approximately two-thirds of the total cost of the house. The husband paid one-third, but also he had assumed liability to the building society under the mortgage and he remained under that liability for about 10 years.

On those facts and figures, and in the circumstances which I have mentioned, it appears to me that justice will be fully and amply done by giving effect to the views which the Master of the Rolls and Denning L.J. have suggested; but I want to make it quite plain that if the respective contributions had been substantially different (if, for example, the wife had contributed only £50 in addition to the deposit and the husband had paid off the rest under the legal liability he had incurred), then it may be that the court would have thought that the best course was to adopt the proportionate basis. However, on the findings as to the contributions in the present case and in view of the husband's liability to the society, I think that the 50/50 solution is the right one.

It seems to me that the only general principles which emerge from our decision are, first, that cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase price of property, and, secondly, that the old-established doctrine that equity leans towards equality is peculiarly applicable to disputes between husband and wife, where the facts, as a whole, permit of its application.

Appeal allowed.

Solicitors: *Mawby, Barrie & Letts, for Raymond A. Hipkins, Blackpool; Bellis, Son & Co., Southport.*

H. C. G.

WHITELEY *v.* WILSON.

[Plaint No. H. 947.]

C. A.

1952
Oct. 24, 27.

Evershed M.R., Romer L.J. and Harman J.

Landlord and Tenant—Rent restriction—Shop let with living quarters —Application of Rent Acts—Dominant user—Premium—Rent and Mortgage Interest Restrictions Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3 (3)—*Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 2.

By a tenancy agreement dated November 27, 1950, certain premises which consisted of a shop with a dwelling-house above it, of a rateable value to be within the provisions of the Rent Restriction Acts, were let to the defendants for a term of three years. By an assignment dated September 10, 1951, the defendants in consideration of the sum of £150 assigned the premises to the plaintiff. In these proceedings the plaintiff sought to recover the sum of £150 from the defendants on the ground that that sum was a premium within section 2 of the Landlord and Tenant (Rent Control) Act, 1949. The county court judge gave judgment for the plaintiff. The defendants appealed on the ground that the dominant purpose of the letting was for shop purposes and accordingly the premises were not within the Rent Restriction Acts and the payment of a premium was legal:—

Held, dismissing the appeal, first, that in a case such as this where the subject matter of the tenancy was one building used partly as a dwelling-house and partly as a shop and no purpose was specified in the tenancy agreement, the question was whether the building should in a broad sense be regarded on the one hand as a dwelling-house which was partly or even substantially used as a shop, or, on the other hand as a shop, which was used in part for residential purposes. If the former were the true view, then the building was within the Rent Restriction Acts by reason of the provisions of the first part of subsection (3) of section 3 of the Act of 1939 and it would not be taken out of the Acts because of the general provisions at the end of subsection (3). If, on the other hand, the common sense of the matter was that the building was a shop, then it was outside the first part of the subsection and would not be brought within the Act by virtue of the second and third parts of the section. It was only in cases where the first part of the subsection was inapplicable that the effect of the second and third parts need be considered. The latter parts of the subsection applied mainly, if not wholly, to land or other premises let together with a dwelling-house, and not forming part of its structure. Secondly, the question whether the premises did or did not in the present case constitute a dwelling-house was one of fact. The county court judge having found that it was a dwelling-house, that concluded the case.

The principle laid down in *Vickery* v. *Martin* [1944] K.B. 679 applied.

Feyereisel v. *Turnidge* [1952] 2 Q.B. 29 considered and explained.

Thompstone v. *Simpson* [1952] 1 T.L.R. 447 questioned.

APPEAL from Judge Clothier sitting at Lambeth county court.

By a tenancy agreement dated November 27, 1950, Harriet Sparkes let to the defendants, Frederick Albert Wilson and his wife Nellie Wilson, " All that messuage and shop premises situate " and known as No. 67 Bellenden Road, Peckham," for a term of three years from November 27, 1950, and thereafter on a monthly tenancy at the annual rent of £100 9s. 8d. The defendants undertook to do the interior decorations. The landlady covenanted to keep in good repair the exterior of the premises. The agreement contained no covenant to carry on any trade in the shop nor was there any covenant not to carry on any particular trade.

The premises consisted of a shop on the ground floor, with dwelling-house premises above. There were separate means of access from the street to the shop and to the dwelling-house part of the premises. There was some means of communication between the shop and the other part of the premises but its exact nature did not appear from the evidence.

The defendants advertised the premises in a London evening newspaper as " Shop premises, four rooms, bathroom, vacant " possession, suitable any trade £160." By an agreement dated September 10, 1951, the defendants assigned the premises to the plaintiff, Madaline Whiteley, in consideration of the payment of £150. The assignment did not include any assignment of the goodwill of any business then being carried on in the shop.

In these proceedings the plaintiff claimed repayment of the sum of £150 on the ground that the premises were within the Rent Restriction Acts and that the payment was a premium within section 2 of the Landlord and Tenant (Rent Control) Act, 1949.[1] The county court judge gave judgment for the plaintiff for £150, holding that the premises in question were premises to which the Rent Restriction Acts applied.

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[1] Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (3): " . . . " The application of the principal Acts, " by virtue of this section, to any " dwelling-house shall not be excluded " by reason only that part of the " premises is used as a shop . . . " and for the purposes of the Rent " and Mortgage Interest Restrictions " Acts, 1920 to 1938, as amended by " virtue of this section, any land or " premises let together with a dwelling-house shall, unless the land or " premises so let consists or consist of " agricultural land exceeding two " acres in extent, be treated as part " of the dwelling-house; but, save as " aforesaid, the principal Acts shall " not, by virtue of this section, apply " to any dwelling-house let together " with land other than the site of the " dwelling-house."

Landlord and Tenant (Rent Control) Act, 1949, s. 2 (2): " . . . a person " shall not, as a condition of the " assignment of a tenancy to which " this section applies, require the payment of any premium."

" (3) This section applies to any " tenancy of a dwelling-house, being " a tenancy to which the principal " Acts apply, such that when the " dwelling-house is let under the " tenancy it is a dwelling-house to " which the principal Acts apply."

The defendants appealed.

Robin Dunn for the defendants. The county court judge was wrong in holding that these premises were premises to which the Rent Restriction Acts applied. The dwelling-house here was let together with land other than the site of the dwelling-house and it falls within the latter part of subsection (3) of section 3 of the Act of 1939, and the whole premises are accordingly outside the scope of the Acts. If the premises let comprise in fact two separate entities, then the proviso to subsection (3) applies.

This is a case where it is necessary to find what was the dominant user for which the premises were let. The question is whether these premises were let primarily as shop premises or as a dwelling-house. It appears from the decision of the Court of Appeal in *Feyereisel* v. *Turnidge*[2] that if the dominant user was for shop purposes the Acts do not apply. The Court of Appeal there followed the Scottish decision of *Pender* v. *Reid*.[3] There was no evidence on which the county court judge could hold that there was a letting for residential purposes. If there is any doubt as to the dominant user, it is for the tenant to show that the premises are within the Acts. It is the intention of the landlord in letting the premises, not of the tenant in taking them, which must be determined. The tenants rely on the decision of Hallett J. in *Thompstone* v. *Simpson*.[4] The county court judge only considered the purpose for which the plaintiff took an assignment of these premises. That was wrong. He should have considered the purpose for which they were let. This was a letting of a shop with living accommodation and the letting was outside the Rent Restriction Acts altogether.

Charles Lawson for the plaintiff. No question of dominant user arises here. This was the letting of a dwelling-house. The fact that part of the premises was a shop does not take the premises out of the protection of the Acts. The only difficulty here is in connexion with Hallett J.'s decision in *Thompstone* v. *Simpson*.[4] It is submitted that that case was wrongly decided.

EVERSHED M.R. The subject-matter at issue in this action was a sum of money, £150, paid by way of premium upon the assignment of a leasehold interest in certain premises known as

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[2] [1952] 2 Q.B. 29.

[3] 1948 S.C. 381.

[4] [1952] 1 T.L.R. 447.

67 Bellenden Road, Peckham. It is conceded that the answer to the claim for its return depends upon whether the premises in question were or were not within the ambit of the Rent Restriction legislation. And, whether or no the premises, if they were so within the Rent Restriction legislation, were what are known as new rent-controlled premises or old, the argument has proceeded upon the footing that the question to be determined depends upon the proper application to the facts of the case of section 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939.

[His Lordship stated the facts and read the relevant provisions of section 3 (3), and continued:] If this matter were res integra, I should myself say that the first question to ask, and if possible to answer, is whether the premises in question fall within the first of the three phrases which constitute subsection (3) of section 3 of the Act of 1939; in other words, is there here a dwelling-house? In my judgment, applying the ordinary standards of common sense to the problem, and upon the facts as I have stated them, I would answer that question unhesitatingly in the affirmative.

If that be right, as the subsection lays down, it matters not, so far as the application of the Act is concerned, that some part of the dwelling-house is in fact used for business or trade purposes. In that connexion Lord Greene M.R. in *Vickery* v. *Martin*[5] pointed out that it was not necessary in order that the premises should remain within the Act that the business use or business part of the premises should be merely unsubstantial in extent; the question of substance did not of itself matter—the question was, however great or small the extent of the business carried on, were the premises a dwelling-house? *Vickery* v. *Martin*[5] was a case in which the tenant conducted a lodging-house business on a substantial scale. This court nevertheless held that the house was a dwelling-house within the meaning of the Act.

If that view is right, then, as it seems to me, the first part of this subsection applies, and the second and third phrases need not be considered; for I should read the second and third phrases (again treating the matter as res integra) as applying not to the case of a single structure but to the case where, in addition to the dwelling-house and the land on which it stands, there is also comprised in the letting, or there are also let at the same time, other land or premises, either built upon or not; that view of the case seems to me to be borne out particularly by the reference at the very end of the subsection to the "site" of the dwelling-house as distinct from the other land let therewith. The view which I have expressed was also, as I have understood it, the view of the county court judge.

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[5] [1944] K.B. 679, 683.

Now, a challenge to that view has been presented to us on behalf of the defendants, who say that although there is here one single structure, nevertheless, having particular regard to certain decisions, you have to examine the question, and answer the question, which of the two characteristics of this building predominates? Is it predominantly used or was it predominantly let for dwelling-house purposes, or, on the contrary, predominantly for business uses? and Mr. Dunn seeks to invoke, as authority for that approach, the second and third phrases of the subsection.

The principal authority upon this matter in this country is to be found in the recent decision of this court in *Feyereisel* v. *Turnidge*.[7] I was anxious to examine the judgments in that case in order to see whether the view which I should myself form, unaided by authority, was consistent with the judgments delivered in the *Feyereisel* case.[7] I think that nothing in that case affects or qualifies what I take to be the ordinary meaning of the language in question.

In the *Feyereisel* case [7] the question related, not to a single structure, but to a camping site upon which were a number of bus bodies and huts, and also a bungalow available for, and used in fact by, the tenant for personal occupation; but it was plain from the facts in the case that the letting was for the purpose of enabling the plaintiff in the action to carry on upon that composite site the business connected with a camping ground, the bungalow being an adjunct to that business, and available to him for his convenience as a residence in connexion therewith.

The case therefore, as I follow the judgments, turns upon the second and third phrases of the subsection, the first phrase (that which I think applies here) having no application to the whole subject-matter of the letting. That the first phrase of the subsection was there regarded as inapplicable appears to my mind clearly enough from (to take one example) a passage in the judgment of Somervell L.J.[8] He there dealt with an argument that if somewhere on the subject-matter was to be found a dwelling-house, then (by operation of the second phrase) the Act applied to give protection, and in connexion with that argument the Lord Justice used this phrase [8]: "If Mr. Thesiger is right, what would "in ordinary language be described as a lease of business premises,

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[7] [1952] 2 Q.B. 29.

[8] Ibid. 33.

"if within the rateable value, would obtain the protection of "the Act if you could find a dwelling-house within it. I think "that those very words used at the beginning of this section by "necessary implication negative that proposition."

In the *Feyereisel* case,[9] since upon its facts it fell to be determined by reference not to the first but to the second and third phrases, it was necessary (and the court so laid it down) to decide whether the dwelling-house was an adjunct to the rest of the subject-matter, or vice versa; and in adopting that approach this court expressed itself as in agreement with a similar conclusion reached in Scotland in the case of *Pender* v. *Reid*.[10] In that case the subject-matter consisted of property which included a house and yard, but that house and yard formed but a small part of the premises as a whole, which contained a coal ree and other elements, indicating that its primary purpose was for carrying on a coal business thereon.

I am content to adopt, as I respectfully do, the summary of the effect of section 3 (3) in the judgment of Denning L.J. in the *Feyereisel* case.[11] He there referred to the case of *Vickery* v. *Martin*[12] and to another case, *Kitchen's Trustee* v. *Madders*,[13] and said: "In those cases there was one house let and used as "a single entity for dwelling purposes. It was not let together "with other land or premises. The effect of section 3 (3) is "therefore as follows:—First, a dwelling-house does not cease to "be protected simply because a substantial part of it is used for "business purposes; secondly, a dwelling-house does not cease "to be protected simply because it is let with something else "which is an adjunct to it, such as a garden, a yard, a garage "or a paddock; but thirdly, a dwelling-house is not protected "if it is let with more than two acres of agricultural land; or if "something else, such as a factory or a business, is the main "object of the letting, and the dwelling-house is merely an "adjunct to it. This case comes within the third category. "The camping site was the main object of the letting and the "bungalow was merely an adjunct to it."

I add in reference to *Feyereisel's* case[14] that the passage which my brother Romer cited from Lord Radcliffe's opinion in *Langford Property Co. Ld.* v. *Batten*[15] seems to me to support the same conclusion: "The basic thing therefore," said Lord

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[9] [1952] 2 Q.B. 29.
[10] 1948 S.C. 381.
[11] [1952] 2 Q.B. 29, 38, 39.
[12] [1944] K.B. 679.
[13] [1950] Ch. 134.
[14] [1952] 2 Q.B. 29, 40.
[15] [1951] A.C. 223, 238.

Radcliffe, "which is protected is the structure forming a house "or part of a house and the site that it occupies. If something "beyond that is also to come within the protection of the Act "it must be brought within it by the operation of some positive "enactment to be found between the beginning and the end of "subsection (2)." The noble Lord was there referring to section 12 (2) of the Act of 1920.

I appreciate, of course, that the *Langford* case [15] was directed to quite a different subject-matter, but that language of Lord Radcliffe does seem to me to lend force to the view that if the case falls, on a fair view of the matter, within the first part of the subsection, the court is relieved from examining further the second and third.

Whether a structure is a dwelling-house or is an office, or constitutes other business premises, is a question of fact in the particular case, to be determined on the evidence; and I do not doubt that in marginal cases the court may properly consider whether the business use or the business occupation does not so far predominate as to exclude from material significance the fact that there may be some part of the premises which can be said to be used for residential purposes, as Somervell L.J. observed in the *Feyereisel* case.[16]

But that kind of consideration is quite a different matter from the question whether the dwelling-house is an adjunct to the rest of the subject-matter or vice versa, which arises on the second and third parts of the subsection, and the case of *Vickery* v. *Martin* [17] makes it (as I have said) quite plain that the mere fact that the business carried on is of a most substantial character does not of itself disqualify the premises as a whole from being a dwelling-house.

That being my view, I agree entirely with the judge that the question of balancing the uses, which process has to be performed in a case falling within the second and third parts of the subsection, does not arise here at all. I agree with him that this is, or was at all material times, a dwelling-house, and is entitled to the protection of the Act accordingly.

Having formed that view, I think it is only right to say by way of conclusion that I have found myself unable to accept what I apprehend to be certain of the reasoning of Hallett J. in the case of *Thompstone* v. *Simpson*.[18] That (like the present) was a case of a single structure, the ground floor of which was used for business purposes and the first and second floors for living accommodation. The judge found, as a fact, that the business part and the living part of the premises were "divisible into "two separate entities," and that the dominant purpose of the house was the carrying on of a business and not the provision of a dwelling-house. The part of the reasoning from which I venture to dissent is that which involves and proceeds on the consideration of dominant purpose. If the judge had found as a fact that the first and second floor should be regarded as one entity, distinct from the shop premises on the ground floor, which were to be regarded as a wholly distinct entity, then I think he might have proceeded to find that the latter entity was outside the protection of the Act, and he might have made an order confined to it alone. But he did not so decide, or so conclude, for he made an order relating to the whole premises. He might again have found that the premises were not a dwelling-house at all in any proper sense, but were in fact business premises; but such a finding, which might have been difficult on the evidence, was not the finding at which he arrived. He, I think, thought that the Scottish case of *Pender* v. *Reid* [19] applied no less to the parts of a dwelling-house, one vertically imposed upon another on a single site, than to a dwelling-house and other premises horizontally adjacent, and in that interpretation of the case of *Pender* v. *Reid* [19] I think with all respect that he was mistaken. Indeed, it seems to me that the view that he took was not properly consistent with the later case of *Vickery* v. *Martin*,[20] or indeed with the reasoning of *Feyereisel* v. *Turnidge*.[21] On the other hand, it seems to me that to the Scottish case of *M'Clymont's Trustees* v. *Ross* [22] no such criticism can be directed, for in that case the finding of the court was that the business part of the premises had become completely separated, in fact and in occupation, from the dwelling-house part, and the order of the Scottish court was for possession of the former only.

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[15] [1951] A.C. 223, 238.

[16] [1952] 2 Q.B. 29, 33.

[17] [1944] K.B. 679.

[18] [1952] 1 T.L.R. 447.

For the reasons which I have given, I think the judge here came to a correct conclusion, and that this appeal should be dismissed.

ROMER L.J. I agree, and I certainly find myself in agreement with the judge that no question of dominant purpose really arises in the present case. I think that the question in such cases as this, where the subject-matter of the tenancy is one building used partly as a dwelling-house and partly as a shop, and no purpose is specified in the tenancy agreement, is whether the building should in a broad sense be regarded on the one hand as a dwelling-house which is partly or even substantially used as a shop, or on the other hand as a shop which is used in part for residential purposes. If the former, then the building is within the Rent Restriction Acts, by reason of the first part of section 3 (3) of the Act of 1939, and will not be taken out of it because of the general provision at the end of the subsection. If on the other hand the common sense of the matter is that the building is a shop, then it is outside the first part of the subsection and will not be brought within the Act by virtue of the second part.

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[19] 1948 S.C. 381.

[20] [1944] K.B. 679.

[21] [1952] 2 Q.B. 29.

[22] 1929 S.C. 585.

In my opinion it is only in cases in which the first part of the subsection is inapplicable that the effect of the second and third parts need be considered, and these apply, as I think, mainly if not wholly, to land or other premises let together with a dwelling-house and not forming a part of its structure.

The question whether the premises in the present case did or did not constitute a dwelling-house is one, I think, of fact, and one on which the judge arrived at a conclusion after approaching the matter from the right angle. He found that it was a dwelling-house, and that to my mind was an end of the case, because it is a dwelling-house within the first part of the subsection, and it is not excluded merely because a part of it is used as a shop.

With regard to the case of *Thompstone* v. *Simpson*,[23] I entirely agree with the observations that my Lord has just made upon that, and I have nothing to add to what he has said about it.

With regard to the *Feyereisel* case,[24] I would associate myself with what my Lord has said as to the summarized conclusion which Denning L.J. expressed as to the effect of section 3 (3) of the Act of 1939. It appears to me to be a complete and entirely satisfactory definition of the effect of the subsection operating on the various subject-matters to which it is directed.

Finally, with regard to that case I would like to say one word about an observation which I made. After referring to the part of subsection (3), which refers to the case of a dwelling-house let together with land other than the site of the dwelling-house, I said[25]: "I regard that part of the subsection as constituting the "general law applicable to composite lets." I only want to say

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[23] [1952] 1 T.L.R. 447.
[24] [1952] 2 Q.B. 29, 39.
[25] Ibid. 39.

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that that phrase was not intended to refer to the first part of the subsection, which is directed to tenancies of dwelling-houses of which a part is used as business or similar premises, but only to the lettings of a composite character which are envisaged by the second and third parts of the subsection.

For the reasons which my Lord has given, and for the reasons I have stated, I agree that this appeal must be dismissed.

HARMAN J. I agree that the appeal should be dismissed, and for the reasons stated by my Lords.

Appeal dismissed.

Solicitors: *Frank J. Stimpson; Rising & Ravenscroft.*

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Nov. 3.
Somervell, Jenkins and Hodson L.JJ.

COODEN ENGINEERING CO. LD. *v.* STANFORD.

[1949 C. No. 4730.]

Contract—Penalty clause—Hire-purchase—Motor-car—Hirer in arrears with payments of instalments—Breach of agreement—Agreement terminated by owners—Car returned to owners—Claim by owners of unpaid instalments under clause of agreement—Whether penalty or pre-estimate of damages.

By a hire-purchase agreement the plaintiffs agreed to hire a motor-car to the defendant for the term of 30 months and the defendant agreed to pay in respect of the hire a sum of £412 7s. 6d., payable in monthly instalments. Clause 10 of the agreement provided that the hirer could at any time return the car to the owners and determine the agreement on payment of all instalments then falling due and unpaid, and also a sum which represented 40 per cent. of the total amount of the remaining instalments in lieu of compensation for agreed depreciation in the market value of the vehicle. By clause 11 the owners were entitled, by notice or otherwise, to determine the hiring and retake possession of the car should the hirer have made any incorrect or untrue statement, or suppressed any information, in the hire-purchase proposal, or fail to make any payment under the agreement on the day on which it was due or demanded, or the hirer should die, and on such determination the full balance then remaining unpaid of the sum of £412 7s. 6d., together with all costs, charges and expenses whatsoever which the owners might incur or become liable for in the exercise of their powers under that or any other clause, or which they might be required to pay in order to regain possession of the vehicle, should at once become payable to and be recovered by them, together with interest thereon at the rate of 10 per cent.

The defendant hirer having fallen into arrears with the instalments the owners terminated the agreement, retook possession of the car, and sued the hirer, under clause 11 for the sum of £297 10s. 9d., the unpaid balance of the instalments. The hirer contended that the provisions of clause 11 constituted in law a penalty and the sum claimed was therefore not recoverable.

Croom-Johnson J. basing himself on a decision of Simonds J. in *In re Apex Supply Co. Ld.* [1942] Ch. 108 held that the question of penalty did not arise and the plaintiffs were entitled to judgment. On appeal:—

Held, by Somervell and Hodson L.JJ., Jenkins L.J. dissenting, that the sum claimed was a penalty and not recoverable, and the appeal must be allowed.

All members of the court were agreed that if the sum sued for could be regarded as a penalty it was penal in amount.

Per Jenkins L.J. (dissenting) (applying the reasoning of Salter J. in *Elsey & Co. Ld.* v. *Hyde* (Jones and Proudfoot's Notes on Hire Purchase Law, 2nd ed. at p. 107)): The sum prescribed by clause 11 became payable not because the hirer had committed a breach of contract, but because the hiring had been determined. Supposing the sum prescribed by clause 11 became payable on a determination by notice founded on the death of the hirer, or on an automatic determination due to the presentation of a winding-up petition against the hirer (being a company) no question of the sum being a penalty in the relevant sense could arise, and that being so it was impossible to invest the same sum with the character of a penalty where the determination by reason of which it became payable happened to be brought about by notice founded on, or automatically by, some breach of contract on the part of the hirer.

Per Hodson L.J.: In applying clause 11 of the contract it seemed unreal to speak of a remedy arising from the right to determine a contract in the case of a breach as opposed to a remedy arising from the breach.

Decision of Croom-Johnson J. reversed.

APPEAL from Croom-Johnson J., sitting at Lewes Assizes.

By a hire-purchase agreement dated July 19, 1947, the plaintiffs agreed to let, and the defendant agreed to hire, a 1935 model Ford (8 h.p. saloon) motor-car for the term of 30 months, and the hirer agreed to pay to the owners in respect of the hire the sum of £412 7s. 6d., payable in monthly instalments. On June 3, 1949, the defendant being in arrears with the instalments, the plaintiffs issued a summons under the Courts (Emergency Powers) Act, 1943, for liberty to exercise the remedy of taking possession of the motor-car, and on June 17 liberty was granted by Master Horridge. Meanwhile, on June 9, the motor-car had been returned by the defendant to the plaintiffs, and accepted by them, and the case proceeded on the basis that the owners had determined the agreement.

By the present action the plaintiffs claimed to recover from the defendant, under clause 11[1] of the agreement, £297 10s. 9d., being the balance of the instalments.

The defendant, by his defence, contended that the provisions of clause 11, by which the balance of the sum of £412 was claimed, constituted in law a penalty, and therefore that sum was not recoverable. Further, that the plaintiffs, having taken possession of the motor-car and resold or otherwise disposed of it, the defendant was entitled to be given credit therefor.

The action came before Croom-Johnson J. at Lewes Assizes, and on March 31, 1952, the judge, basing himself on a decision of Simonds J. in *In re Apex Supply Co. Ld.*,[2] held that the question of penalty did not arise and the plaintiffs were entitled to judgment.

The defendant appealed.

P. Lamb Q.C. and *F. Whitworth* for the defendant. The facts are all admitted, and with the exception of a few letters no evidence was tendered by either party at the trial. The short point is whether, as was contended by the defendant, the sum claimed is a penalty, and therefore not recoverable, or whether it is a pre-estimate of damage. The agreement in question is unusual in form, and no similar agreement is to be found in any of the authorities. It was admitted before the judge below, and has never been in dispute, that the agreement was terminated by the plaintiff owners because the defendant hirer was in default in respect of payment of the monthly instalments.

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[1] By clause 11 of the agreement: "If the hirer shall have made any "incorrect or untrue statement or "suppressed any information in the "said hire purchase proposal, or shall "fail to make any payment under "this agreement on the day on "which it is due or demanded, as "the case may be, or shall die, the "owners may by 24 hours' previous "notice in writing determine the "hiring . . . and on any such "determination by notice or other-"wise the full balance then remain-"ing unpaid of the sum mentioned "in clause 1 of this agreement, "together with all costs, charges, "and expenses whatsoever which the "owners may incur or for which they "may become liable . . . or which "they may be required to pay in "order to regain possession of the "vehicle, shall at once become pay-"able to and be recoverable by them. "All moneys payable under the pro-"visions of this clause by the hirer "to the owners shall carry interest at "the rate of 10 per cent. per annum. ". . ."

[2] [1942] Ch. 108.

By clause 10 of the agreement the hirer was entitled at any time to return the vehicle and terminate the agreement "on "payment of all instalments which have fallen due prior to the "date of such return and are then unpaid, and such a sum as "represents 40 per cent. of the total amount of the monthly "instalments which have not then fallen due (this sum being "payable in lieu of compensation for agreed depreciation in the "market value of the vehicle)." The present claim is brought under clause 11, which applies where the owner retakes possession and terminates the agreement. Under clause 11, in any one of the following three events the owners are entitled to retake possession and terminate the agreement: (1) making any untrue statement or suppressing any information in the hire-purchase proposal; (2) failure by the hirer to make any payment under the agreement on the day on which it is due or demanded; and (3) the death of the hirer. On any such determination, by notice or otherwise, the full balance of the instalments, then remaining unpaid, of the total of £412 7s. 6d., together with all costs, charges and expenses whatsoever, which the owners may incur or for which they may become liable in the exercise of their powers under any clause of the agreement, shall at once become payable by the hirer, together with interest thereon.

The judge, in the course of his judgment, several times said that he felt constrained to give judgment for the plaintiffs because of certain authorities to which he had been referred, but it is submitted that those cases, unreported except in Jones and Proudfoot's Notes on Hire Purchase Law, 2nd ed., are distinguishable from the present case. The primary obligations created by this hire-purchase agreement are to hire out a motor-car and to pay £412 7s. 6d. in respect of that hiring. There are a number of secondary and ancillary obligations designed to effect the primary purpose, but there is still only one consideration. Clause 10 provides for what is to happen if the hirer returns the vehicle before the end of the hiring, and the amount which under that clause the owner was willing to take if the car was returned to him must be regarded as a maximum figure for a pre-estimate of damage due to depreciation if the agreement is terminated.

Clause 11 makes a wholly different provision when any event happens which determines the hiring ipso facto, or by the exercising of the owners' rights. In none of the earlier authorities was that distinction present and it was sought in the court below to distinguish them on that ground. The judge relied on *Elsey*

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& Co. Ld. v. *Hyde* [3]; *Roadways Transport Development Ld.* v. *Browne and Gray*,[3] and *Chester & Co. Ld.* v. *Wright*,[3] which were referred to and followed by Simonds J. in *In re Apex Supply Co. Ld.*[4] No general principle of law is to be found in those cases, and clause 11 in the agreement now under consideration raises a point which was not before the court in *In re Apex Supply Co. Ld.*[4]

The general principles of law were decided long ago, and in 1915, in *Dunlop Pneumatic Tyre Co. Ld.* v. *New Garage and Motor Co. Ld.*,[5] Lord Dunedin laid down certain propositions, to be deduced from the authorities, on which propositions the defence relies. Proposition 2 is: "The essence of a penalty is "a payment of money stipulated as in terrorem of the offending "party; the essence of liquidated damages is a genuine covenanted "pre-estimate of damage." The requirement in clause 11 is in terrorem because it is diametrically opposed to clause 10, which is a pre-estimate of damage. Paragraphs (*a*), (*b*) and (*c*) of proposition 4 are as follows: "(*a*) It will be held to be penalty "if the sum stipulated for is extravagant and unconscionable in "amount in comparison with the greatest loss that could con-"ceivably be proved to have followed from the breach. (*b*) It "will be held to be a penalty if the breach consists only in not "paying a sum of money, and the sum stipulated is a sum greater "than the sum which ought to have been paid. (*c*) There is a "presumption (but no more) that it is penalty when a single "lump sum is made payable by way of compensation, on the "occurrence of one or more or all of several events, some of which "may occasion serious and others but trifling damage." It is submitted that the propositions laid down by Lord Dunedin, and particularly 4 (*c*), are satisfied in this case, and the appeal should be allowed.

Bernard Finlay for the plaintiffs. The question of penalty or liquidated damages does not arise in this case at all. It is merely a contractual undertaking for the payment of a certain sum of money in certain events. If that is wrong, and the court has to consider that question, then it is submitted that in fact the sum claimed is for liquidated damages and not a penalty. It is a contract that, in an event happening which ipso facto brings the agreement to an end under clause 11, the hirer undertakes that he will pay a sum of money calculated in accordance with the instalments which remain due. It would be a strange anomaly if, where a claim arises because of a breach of the agreement by the hirer, a question of penalty could be raised, but it could not be raised where the agreement had terminated on the death of the hirer. The fundamental obligation of the hirer under the agreement is to pay £412 for the hire of the car for 30 months, payable by monthly instalments. Although a claim for the whole hire if the first instalment is not paid in due time may seem unconscionable, it does not appear so unconscionable when it is considered that the car may be returned in such a condition as to be worthless. It would be strange if, where the hirer, wishing to get out of his obligation, terminates the agreement, the owner can claim an agreed sum and it would not be a penalty, yet, if the owner terminates the agreement because of a breach of contract, and claims a like sum, it could be held to be a penalty.

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[3] Jones and Proudfoot's Notes on Hire Purchase Law, 2nd ed., pp. 107, 118, 124.

[4] [1942] Ch. 108.

[5] [1915] A.C. 79, 86.

It necessarily follows that when the hirer returns the car under clause 10 the sum of money which the owners can claim should be less than they could claim under clause 11, which merely gives them a right to claim the difference between the instalments paid and the total hire which ought to be paid. There is nothing punitive about clause 11, and when the sum claimed is compared with the loss to the owners it cannot be said to be in terrorem. Lord Dunedin's proposition 4 (*b*), stated in *Dunlop Pneumatic Tyre Co. Ld.* v. *New Garage and Motor Co. Ld.*,[6] does not apply, because the sum stipulated is not "greater than the sum which "ought to be paid." Proposition 4 (*c*) only creates a difficulty if clause 11 is an omnibus clause and is not severable. It is submitted that any breach of the covenants specified in clause 11 may conceivably result in heavy loss to the owners.

Whitworth replied.

Cur. adv. vult.

November 3. The following judgments were read:—

SOMERVELL L.J. In this case the plaintiffs claimed £297 as due under a hire-purchase agreement, the subject-matter of which was a second-hand motor-car. The defence is that the sum claimed is in law a penalty and irrecoverable. In answer to this the plaintiffs submit, first, that on the true construction of the agreement the question whether this is a penalty or a pre-estimate of damages does not arise. In other words, it does not fall to be considered as a sum stipulated to be paid on a breach or breaches of contract. The plaintiffs submit, secondly, that if it has to be so considered it is a pre-estimate of damages and not a penalty. The plaintiffs' first contention is said to be supported by authority and the judge so held. The defendant submits that the authorities cited are distinguishable, or that if the principle derived from them is applicable to this case they are wrong.

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[6] [1915] A.C. 79, 87.

In order to appreciate how these issues arise I will set out first the relevant terms of the agreement. Clause 1: "The owners ". . . agree to let and the hirer agrees to hire the motor vehicle "and accessories . . . for the term of 30 months as from the "19th day of July, 1947 (subject to determination as hereinafter "provided) and to pay to the owners in respect of such hire "without previous demand at their said office at Cooden aforesaid "the sum of £412 7s. 6d. payable as to £25 on or before taking "delivery of the said vehicle and as to the balance in monthly "instalments of £12 18s. 3d. payable on the 19th day of each of "the next 30 succeeding calendar months the first instalment to "be paid on the 19th day of August next. In default of payment "of any instalment within seven days of the same becoming due "the hirer shall pay to the owners interest thereon at the rate of "10 per cent. per annum from the due date until actual payment "without prejudice to the other rights of the owners hereunder." Some of the other provisions relied on on one side of the argument or the other can be summarized. The hirer undertakes (a) not to sell the car or part with possession of it; (b) not to allow it to go outside the United Kingdom; (c) not to allow it to be driven by an unlicensed, unqualified or incompetent driver; (d) to keep it in good repair; (e) to take all risks and keep it fully insured; (f) not to change the permanent garage without previous notice in writing.

Clause 10, which played a considerable part in the argument, provided that the hirer could at any time return the vehicle and terminate the agreement on payment of (a) all instalments which have fallen due prior to the date of such return and are then unpaid, and (b) such a sum as represents 40 per cent. of the total amount of the monthly instalments which have not then fallen due (this sum being payable in lieu of compensation for agreed depreciation in the market value of the vehicle between the date of this agreement and the date of the return of the vehicle), and (c) such a sum as represents the cost of putting the vehicle into proper repair and working condition as required by clause 3 of this agreement, and (d) all other moneys which may be payable to the owners pursuant to clauses 6 and 7 of this agreement, and (e) any damages, compensation, costs and expenses which the hirer may become liable to pay to the owners in respect of the breach or non-observance by him of the provisions of this agreement; (f) in default of payment of any amount due to the owners under this clause upon an account stated within 14 days of demand for payment having been made upon the hirer by the owners, such amount due under this present clause shall carry interest thereon at the rate of 10 per cent. per annum from the date above mentioned until actual payment.

Clauses 6 and 7 deal with payment of licence duties and insurance premiums and provide that if these are not paid by the hirer and are paid by the owners the latter can recover the sums so paid from the hirer.

The claim is made under clause 11, the relevant parts of which read as follows: "If the hirer shall have made any incorrect or "untrue statement or suppressed any information in the said "hire-purchase proposal or shall fail to make any payment under "this agreement on the day on which it is due or demanded as "the case may be, or shall die, the owners may by 24 hours' "previous notice in writing determine the hiring . . . and on "any such determination by notice or otherwise the full balance "then remaining unpaid of the sum mentioned in clause 1 of "this agreement, together with all costs, charges and expenses "whatsoever which the owners may incur or for which they may "become liable in exercise of their powers under this and/or "any other clause in this agreement and/or which they may be "required to pay in order to regain possession of the vehicle, shall "at once become payable to and be recoverable by them. All "moneys payable under the provisions of this clause by the hirer "to the owners shall carry interest at the rate of 10 per cent. "per annum from the date of the same becoming due from the "hirer or from the date of the same being expended by the owners "under the provisions of this clause until payment thereof by the "hirer to the owners."

Although the document is not before us, the case was argued on the basis that the owners had determined the hiring by 24 hours' notice in writing on the ground that payments had not been made on the due day. Under clause 12 the hirer has an option, when all the payments have been made, of purchasing the vehicle for ten shillings. Under clause 13 the agreement is personal to the hirer and cannot be assigned.

The defendant was admittedly a very bad payer and considerable indulgence was given him by the plaintiffs. He had the car for nearly two years during which he only paid some seven or eight instalments. It is, however, clear from the decision in *Dunlop Pneumatic Tyre Co. Ld.* v. *New Garage and Motor Co. Ld.*,[7] that the question whether a sum is a penalty or a pre-estimate of damages, if it arises, has to be considered as at the date of the contract and having regard to its terms, and not on the particular breach or breaches on which the claim is based: see Lord Dunedin's proposition 3.[8]

The first issue is, does the question arise? The trial judge held that it did not, basing himself on a decision of Simonds J. in *In re Apex Supply Co. Ld.*[9] Simonds J. followed and applied what was said by Salter J. in *Elsey & Co. Ld.* v. *Hyde* (1926),[10] and by Greer L.J. in *Chester & Cole Ld.* v. *Wright* (1930).[11] These were both decisions of a Divisional Court, Lord Hanworth M.R. sitting with Greer L.J. in the second case. Neither of these two cases are reported in any law report, but the judgments are set out in "Notes on Hire Purchase Law by Jones and Proudfoot," from which citations are made by Simonds J. In these three cases it would appear that the measure of the hirer's liability was the same whether (1) he exercised an option to return the car and terminate the hiring, as he could do under clause 10 of the present agreement, (2) some event happened, such as the commission of an act of bankruptcy or the levy of execution on the car, or (3) the owner exercised a right similar to that in clause 11 to terminate the hiring for a breach of the agreement. In *Elsey's* case [10] the hirer was in arrear with his payments as here. In *Chester & Cole Ld.'s* case [11] the hirer had died, but I gather from the report that the claim was not based on any express provision as to death, but on the fact that, perhaps in consequence of the death, payments were not made. It is also clear in these cases that the sum to be paid was less than the total purchase price.

In both cases both judges considered whether the sum was a penalty under that branch of the law and decided that it was not, but was a reasonable pre-estimate of damage due to depreciation of the vehicle. In *Elsey's* case [10] Fraser J. based his decision solely on this point, as did Lord Hanworth M.R. in *Chester &*

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[7] [1915] A.C. 79.

[8] Ibid. 86–7.

[9] [1942] Ch. 108.

[10] (Unreported.) See Jones and Proudfoot's Notes on Hire Purchase Law, 2nd ed., at p. 107.

[11] Ibid. 124, 129.

Cole Ld.'s case.[11] In the *Apex Supply* case[12] Simonds J. indicated very clearly that if the question had arisen he would have regarded the sum claimed as a pre-estimate of damages and not as a penalty.

The reasoning which was adopted by Simonds J. in *In re Apex Supply Co. Ld.*[12] is to be found in observations in the judgments of Salter J. and Greer L.J. cited in *In re Apex Supply Co. Ld.*[12] Salter J. said[13]: " ' Supposing the hirer exercises his right to " ' terminate this hiring, how can it be said that this sum of " ' money, which it is agreed shall be paid, is a penalty or that " ' it is a case in which either the agreed sum or liquidated " ' damages must be paid? If the hirer terminates this agree- " ' ment, what right does that give the owner to recover any " ' damages against him? He has done him no wrong, he has " ' broken no contract, and I am quite unable to see that this " ' sum would or could give a penalty if it were claimable in those " ' circumstances. It appears to me to be a strange conclusion, " ' if this money is to be regarded as a penalty, where it was " ' payable in one event and not regarded as a penalty where it " ' was payable in another event. I think, therefore, as it is to " ' my mind not a penalty where it is payable on the return of " ' the article by the hirer, it ought not to be regarded as a penalty " ' where it was payable on the retaking of the article by the " ' owner.' " In *Chester & Cole Ld.'s* case Greer L.J., summarizing a later portion of Salter J.'s judgment, said this[14]: " ' The " ' second question to be determined is a little more difficult. It " ' is whether the sum of £95, diminished by the amounts already " ' paid, is to be deemed to be a penalty for breach of a contract, " ' and not damages, or, as may well be, that it is neither one " ' nor the other, that it is neither a penalty, nor is it liquidated " ' damages, but it is a sum which, in consideration of getting " ' the use of this car, the hirer promised to pay in a certain event, " ' that event being the determination in one way or another of " ' the hiring agreement. There is no reason in law why, for a " ' sufficient consideration, there should not be on the same " ' document two contracts, one a contract to hire the motor- " ' car on the terms of the agreement, and another, a contract " ' that if that agreement comes to an end, then a certain sum " ' will be payable by the hirer; and it may very well be that the " ' view which is, I think, the view of Salter J. in *Elsey & Co.*

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[11] Ibid. 124, 129.

[12] [1942] Ch. 108.

[13] Ibid. 116.

[14] Ibid. 119.

"'*Ld.* v. *Hyde*,[15] which was cited before us, is the right way "'to look at this clause, namely, that it is not either liquidated "'damages or a penalty, but it is a sum payable in respect of "'one event, namely, the determination and end of the hiring "'agreement, whether that end of the hiring agreement arises "'from the hirer delivering the car back again, or whether it "'arises from the owner taking it out of the possession of the "'hirer in the events in which he is entitled to take it out.'"

These passages suggest two lines of reasoning. The first is that if a sum is payable on the happening of one or other of two events, if it is not a penalty in the one case it cannot be in the other. If this is suggested by Salter J. I cannot, with respect, accept it. The events may in fact be so similar that a conclusion on one decides the other. The sum payable if the buyer desires to return the car may so clearly be a reasonable figure to cover depreciation that it would also be a reasonable pre-estimate if the owner exercises any right he has to terminate the agreement on a breach. But it cannot, I think, follow as a matter of law that a sum exigible for a breach or breaches cannot in law be a penalty because it is made payable in the happening of some other event which is not a breach.

The second line of reasoning is put, if I may say so, very clearly in the passage just cited from Greer L.J.'s judgment in *Chester & Cole Ld.* v. *Wright*.[16] It is that the law as to penalties is inapplicable if the owner under the agreement is entitled to "determine" the agreement as the result of any breach. If in a contract of this kind, without the special provisions of clause 11, the hirer committed a breach going to the root of the contract, the owner would be entitled to treat this as a repudiation, to retake possession of the car, to be free from all further obligations to let the hirer have possession of the car and to sue for damages: in other words, to determine the contract and claim damages. The effect of the words we are considering is, I think, to give the same rights in the event of any failure to make punctual payment. The effect of this clause is first to make punctual payment a condition of the contract, and then to provide for the financial consequences to the hirer if the owner treats that breach as a repudiation giving him the right to free himself from all further obligations and claim money. No objection can be taken to the former, but as it seems to me the law as laid down in *Dunlop Pneumatic Tyre Co. Ld.* v. *New Garage and Motor Co. Ld.*[17] is applicable to the financial consequences, which are plainly a sum to be paid in consequence of the breach.

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[15] (Unreported.) See Jones and Proudfoot's Notes on Hire Purchase Law, 2nd ed., at p. 107.

[16] Ibid. 124, 129.

It was further argued that the question of penalty or a reasonable pre-estimate of damage did not arise because the sum to be paid was the balance of the agreed figure for 30 months' hire, notwithstanding that the right to determine could on the clause be exercised if there was one day's delay in the first instalment. This cannot be right. One may take as an example a sale of 1,200 tons of coal for £6,000, the coal to be delivered by monthly instalments of 100 tons, £500 to be paid within seven days of each delivery. It is further provided that if payment is not made within that period the seller shall be free of all obligations as to further deliveries. If the contract went on to provide that the buyer should be liable to pay the cost of the outstanding instalments for subsequent deliveries which he would ex hypothesi not receive, I cannot see how this way of arriving at the sum to be paid could affect the question whether it was a reasonable pre-estimate of damage or a penalty.

I am therefore of opinion that the court has to consider whether applying the principles laid down in Lord Dunedin's speech in *Dunlop's* case,[18] the payment of the full balance is a penalty.

Mr. Lamb, for the defendant, put his argument in three ways: first, he emphasized that on the clause, as drafted, a trivial breach, a delay of a day through inadvertence or illness, would enable this right to be operated. The hirer so far from wishing to repudiate might be able and anxious to fulfil all other terms of the contract and to complete it. He cited *Kemble* v. *Farren*,[19] in which Tindal C.J. held a sum of £1,000, agreed for any breach however trivial or inadvertent, to be a penalty, although in respect of the actual breach sued on the jury had assessed the damages at £750. Secondly, he relied on clause 10. The 40 per cent. under clause 10 of the amount outstanding, being the amount which the owner was willing to take if the car was returned at any time, must, he submitted, be regarded as a maximum figure for a pre-estimate of damage due to depreciation if the agreement were terminated. We are not concerned with this clause except on this argument. In the cases to which I have referred, the sum payable in similar circumstances was, as

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[17] [1915] A.C. 79.

[18] [1915] A.C. 79.

[19] (1829) 6 Bing. 141.

I have said, related to the number of instalments already paid. This seems logical. If the vehicle is in proper repair and 29/30ths of what is in effect the agreed purchase price have been paid, the owner would normally be more than covered for depreciation. Thirdly, the owner is getting back his car which he is free to sell, plus the agreed purchase price less the 10s. 0d. In other words, this will be excessive in all cases unless the car has become valueless. There is, I think, force in all these arguments. Although it cannot be said that the amount exceeds the greatest loss that could possibly follow on the breach, taking words from paragraph 4 (*a*) of Lord Dunedin's summary of the law in *Dunlop Pneumatic Tyre Co. Ld.* v. *New Garage and Motor Co. Ld.*,[20] it will exceed it in all except the exceptional case where the car has become of no value. Lord Dunedin lays down a further proposition in paragraph 4 (*c*): "There is a "presumption (but no more) that it is penalty when 'a single "'lump sum is made payable by way of compensation, on the "'occurrence of one or more or all of several events, some of "'which may occasion serious and others but trifling damage.'" The presumption referred to plainly arises here, and having regard to the second and third arguments to which I have referred I have come to the conclusion that this sum is a penalty and irrecoverable.

In conclusion I would like to emphasize that we are dealing with a case in which the right to determine and claim payment is based on a breach of covenant. The part of the clause with which we are concerned also provides that if the hirer died, for example, a few days after he had taken delivery, the owners could retake possession of the car and claim the balance of the £412 7s. 6d. This obviously raises a different point from that with which we have to deal where the claim is made as the result of a breach. In *In re Apex Supply Co. Ld.*[21] the claim was based on the hiring company having gone into liquidation. Though it may well be that the conclusion would be the same, it might fall to be considered on equitable rather than on common law principles. If anyone desires to argue that the conclusion should be different in the case of a death or an event such as bankruptcy or liquidation, so far as my judgment is concerned I desire to make clear that that point is open. I therefore would allow the appeal.

During the course of the hearing it became clear that the

[20] [1915] A.C. 79, 87.

[21] [1942] Ch. 108.

defendant would have no defence to a claim for the sums in arrear. We indicated that if the plaintiffs were undertaking to make no further claim under other clauses it might be reasonable to allow an amendment of the sum claimed. Such an application has been made and the defendant does not resist it. The effect, therefore, of allowing the appeal will be to enter judgment for the plaintiffs for £142 0s. 9d., the defendant to have the costs here and below.

JENKINS L.J., having stated the facts and read the material clauses of the agreement, continued:—It is not disputed that the sum of £297 0s. 9d., awarded to the plaintiffs by the judgment under appeal, was in the events which had happened due and payable to the plaintiffs according to the expressed terms of clause 11. The sole defence, and the sole ground of appeal, was and is that the sum so expressed to be payable is in the nature of a penalty and therefore irrecoverable. This contention raises (in effect) two questions: (1) Is the sum expressed to be payable on determination of the hiring under the provisions of clause 11 a penalty in the relevant sense (that is to say, a penal sum which the hirer undertakes to pay to the owners in the event of, and in respect of, some breach by the hirer of the terms of the hire-purchase agreement) on the assumption that it *is* penal in amount, that is to say, on the assumption that, when compared with the actual damage to the owners which could possibly flow from such breach, and judged in accordance with the principles stated in *Dunlop Pneumatic Tyre Co. Ld.* v. *New Garage and Motor Co. Ld.*,[22] it will be found to have been imposed in terrorem as distinct from having been fixed as a genuine pre-estimate of damage? (2) If so, is it penal in amount?

Both questions have been discussed in the courts in relation to somewhat similar clauses in other hire-purchase agreements. Three of these cases appear to be unreported elsewhere than in Appendix A to Jones and Proudfoot's Notes on Hire Purchase Law, namely, *Elsey & Co. Ld.* v. *Hyde*,[23] *Roadways Transport Development Ld.* v. *Browne & Gray*,[24] and *Chester & Cole Ld.* v. *Wright*.[25]

Elsey & Co. Ld. v. *Hyde*[26] was heard in the King's Bench Divisional Court by Salter J. and Fraser J. In that case four hire-purchase agreements had been entered into, each in respect of one box carrier tricycle, the tricycle in each case being hired out for a deposit of £5 and monthly instalments of £2 2s. 0d., with an option to purchase for £30 4s. 0d. less the amount of the deposit and instalments previously paid, the purchase taking place automatically on the total paid in deposit and instalments reaching that figure, a process which would take about 12½ months if payments were not anticipated. Each of the agreements contained clauses under which the hirer could terminate the hiring by returning the tricycle to the owners, and the owners could in certain events determine the hiring and retake the tricycle. There was also a clause to the effect that, upon determination of the hiring by either party, under the provisions to which I have just referred, before the expiration of eight months from the date of the agreement, the hirer should pay the owners "such further sum as with the total amount previously paid "under clauses 1 and 2 hereof" (i.e., in respect of deposit and instalments of hire) "will equal the sum of £25 by way of com-"pensation for depreciation of the said article."

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[22] [1915] A.C. 79.

[23] (1926) op. cit., 2nd ed., 107.

[24] (1927) ibid. 118.

[25] (1930) ibid. 124.

[26] (1926) op. cit., 2nd ed., 107.

The hirer being in arrear with his instalments under all four agreements, the owners determined the hire, and sued the hirer in the county court to recover under each of the four agreements (so far as material) arrears of hire, and in addition the difference between the total consisting of the deposit plus instalments of hire paid or in arrear and the sum of £25. The county court judge dismissed the owners' claim to this difference on the ground that it was a penalty. The Divisional Court allowed the owners' appeal, Salter J. saying, towards the end of his judgment[27]: "For these reasons I think first that this is not a case for penalty "at all, and next, if it is, the learned judge took an erroneous "view of the agreement and decided that this declaration was "oppressive and extortionate in law, whereas in my opinion it "is a very reasonable one."

Fraser J. agreed, without adding any observations of his own except on the question of amount. In giving his reasons earlier in his judgment for the view that "this was not a case for "penalty at all," Salter J. said[28]: "As I understand, the "question whether the sum of money which the parties have "agreed shall, in certain events, be paid by one to the other,

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[27] Jones and Proudfoot's Notes on Hire Purchase Law, 2nd ed., at p. 114.

[28] Ibid. 111.

"is a penalty or not, and whether that agreement is, therefore, "enforceable is a question which arises, in cases where the "contract provides that if one party has done something which "he ought not to do and which had prejudiced the other, it "would give the other a right to damages against him. Then "where the parties have purported to fix the amount of damages, "the question is whether that is a genuine agreement liquidating "the damage, or whether it is an oppressive thing and not, as "has been called, a genuine pre-estimate of damage. But those "questions arise, as I understand, in cases where the person who "is to pay has broken a contract with the other or done something which entitles the other to damages against him. This "question is whether the person injured can sue on the contract "for the agreed sum or whether he should be remitted to his "rights and show what damage he has sustained, which may, of "course, be more or may be less than the agreed sum."

Salter J. then adverted to the circumstance that under the agreements he had to consider (differing in this respect from the agreement in the present case) the sum payable on termination of the hiring was the same whether it was determined by the hirer or by the owner, and continued [29]: "If the hirer terminates "this agreement, what right does that give the owner to recover "any damages against him? He has done him no wrong, he "has broken no contract, and I am quite unable to see that this "sum would or could give a penalty if it were claimable in those "circumstances. It appears to me to be a strange conclusion, if "this money is to be regarded as a penalty where it was payable "in one event and not regarded as a penalty where it was payable in another event. I think, therefore, as it is to my mind "not a penalty where it is payable on the return of the article "by the hirer, it ought not to be regarded as a penalty where it "was payable on the retaking of the article by the owner."

Whatever may be thought of this part of the judge's reasoning, it has no application to the present case, for the amount payable by the hirer under clause 10, in the event of his returning the vehicle, is different from the amount payable by him in the event of determination of the hiring by the owners under clause 11. The succeeding passage in the judgment is more pertinent to the present case, for Salter J. goes on to say [30]: "Then the next case I take is where the money is paid on the "determination of the hiring by the owner, not as in this case

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[29] Ibid. 122.

[30] Ibid. 112.

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"in consequence of the conduct of the hirer which is a breach "of contract, but in consequence of the happening of an event "which is not a breach of the contract. For example, supposing "the owner justified his right to retake under clause 8, because "execution has been issued against the hirer. There is no wrong "done by the hirer to the owner, and it is no breach of any "contract which the hirer has made with the owner. How could "that event give to the owner of the goods any right to recover "damages against the hirer, liquidated or unliquidated? It "appears to me that no question of penalty could arise in such "a case, and if this sum is not a penalty where it is payable on "the determination of the hiring by the owner, by reason of the "levy of execution, it seems to me it would be a strange result "if it were to be held a penalty where it is payable on the "termination of the hiring by the owner on the ground of non-"payment of rent by the hirer. That is this case."

"Then there is a third case I take, and that is this one, "where the hire is determined by the owner, because the hirer "is in arrear with his payments. It is proved that this is a "breach of this contract, and it is proved that that breach, "apart from any termination of the hirer, would give the owner "a right to damages against the hirer. But what would those "damages be? They would be interest on the amount unpaid "and nothing more. The fact that the hirer is in arrear with "his payments will not entitle the owner to any damages for "depreciation of these things. The reason that they have "suffered is that they have secondhand goods put on their hands "before they have received very much money in respect of "them. That is not the result of the hirer's breach of contract, "in being late in his payments, it is the result of their own "election to determine the hiring, and it appears to me, even "in this case, there is no question of penalty at all, and there "is no question whether the sum paid shall be regarded as "liquidated damages or a penalty."

It should be noted that Salter J.'s reasoning on his "third "case" is to some extent based on the description of the sum payable as "compensation for depreciation of the said article," a consideration obviously quite irrelevant to the breach of contract constituted by the hirer's being in arrear with his instalments and to such damages (if any) as might be said to flow from that breach. But his reasoning as a whole, as I think, makes it sufficiently plain that in his view where under an agreement of this type the owner has power to determine the hiring in any one of a variety of events, some involving breaches of contract by the hirer and others not, and on determination of the hiring by the owner in exercise of such a power a given sum is made payable by the hirer to the owner, the sum so payable cannot be a penalty in the relevant sense.

As to the question of amount, Salter J. expressed the view (in effect) that the clause under consideration in that case was not oppressive, but on the contrary "most reasonable and "businesslike," as a proper protection of the owners against the loss they might suffer through having a secondhand and depreciated article thrown back on their hands.

In *Roadways Transport Development Ld.* v. *Browne and Gray*[31] (a case in the Court of Appeal), the second question only (i.e., the question of amount) appears to have been considered. The agreement there under consideration (the terms of which are not stated in detail) concerned a motor-car and seems to have contained a provision to the effect that on termination of the hiring by the owners the hirer was to pay them as compensation for depreciation of the car the difference between the instalments down to the date of termination and the sum of £100, a difference which would on the figures be extinguished by the payment of the first six months' hire or thereabouts. Bankes L.J. said[32]: "The other point was that this £100 penalty which "he is asked to pay, and which is provided for in clause 5 of the "agreement, is a penalty and not damages; with respect to that "argument, it seems to me that this is essentially a case in "which it is reasonable to say that there was a genuine pre-"estimate of damage. It is not a case where the sum of money "was made payable upon the happening of any one of a number "of events which were of varying degrees of importance. It is "the happening of only one event. It is quite true the event "may happen because the hirer might wish to terminate the "agreement or because he failed to pay an instalment punctually; "but the event was the determining of the agreement, and there "is a provision as to what is to happen in that event. As has "been pointed out during the argument the money is payable in "order to make up £100, taking into account the number of "monthly payments that have been made, and if six monthly "payments have been made, practically £100 would have been

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[31] Jones and Proudfoot's Notes on Hire Purchase Law, 2nd ed., at p. 118.

[32] Ibid. 121.

"paid or very nearly. Therefore, this clause only comes into "operation on the assumption that it will happen at some time "during the first six months of the hiring. Under these circum-"stances it seems to me that it is quite reasonable to arrive at "a figure such as £100 as representing what might reasonably "be expected to represent the damage or what I would call the "damage to the car of the decrease in the value of the car which "would happen during any part of this period of months, it "being quite uncertain whether the event would happen in the "earlier part or the later part of the period, but more probably "it would happen in the later than in the earlier."

Scrutton L.J. referred to *Dunlop Pneumatic Tyre Co. Ld.* v. *New Garage and Motor Co. Ld.*[33] and said[34]: "It seems to me "on these principles this is clearly a genuine pre-estimate of "damage and that being so the guarantor must pay."

Atkin L.J. said[35]: "On the question of penalty, I have "nothing to add to what has been said. It seems to me this "was in every way a genuine pre-estimate of damage. The "particular damage is expressed in the contract to be by way of "compensation for depreciation of the car. It is true that the "deposit is forfeited, but as a matter of fact if you are merely "dealing with a depreciation of the car the evidence in this "particular case is that the car did depreciate by more than "£100, though the relations were resumed after these first "instalments had become due. That makes it all the more "difficult to say that the pre-estimate of damage in this case "could not be genuine or based upon good grounds."

In *Chester & Cole Ld.* v. *Wright*[36] Lord Hanworth M.R. and Greer L.J., sitting in the Divisional Court as additional judges of the King's Bench Division, had to consider a hire purchase agreement in respect of a car under which, upon return by the hirer or retaking by the owners of the car within 10 months from the date of the agreement, the hirer was to pay to the owners the difference between £95 and the amount of his previous payments "by way of compensation for depreciation of the said "motor." On the question of amount, the court came to the same conclusion as was reached in the earlier cases to which I have referred, i.e., that the amount was not such as to make the payment a penalty. But Greer L.J. dealt also with the question whether this payment, irrespective of amount, could properly be regarded as a penalty at all, and said [37]: "The second question "to be determined is a little more difficult; it is whether the "sum of £95, diminished by the amounts already paid, is to "be deemed to be a penalty for breach of a contract, and not "damages, or, as may well be, that it is neither one nor the "other, that it is neither a penalty, nor is it liquidated damages, "but it is a sum which, in consideration of getting the use of "this car, the hirer promised to pay in a certain event, that "event being the determination in one way or another of the "hiring agreement. There is no reason in law why, for a "sufficient consideration, there should not be on the same "document two contracts, one a contract to hire the motor-car "on the terms of the agreement, and another, a contract that if "that agreement comes to an end, then a certain sum will be "payable by the hirer; and it may very well be that the view "which is, I think, the view of Salter J. in *Elsey's* case,[38] "which was cited before us, is the right way to look at this "clause, namely, that it is not either liquidated damages or a "penalty, but it is a sum payable in respect of one event, "namely, the determination and end of the hiring agreement, "whether that end of the hiring agreement arises from the hirer "delivering the car back again, or whether it arises from the "owner taking it out of the possession of the hirer in the events "in which he is entitled to take it out. But even treating it as "a payment which has reference to a breach of contract, I am "inclined to think, upon the authorities, though the point is not "free from difficulty, that it is not right to say that it is a "penalty. One must remember that a sum which happens to "turn out to be large damages in the events which have happened, is not necessarily a penalty, and that it is perfectly "lawful for people who do not know what the damage arising "from a breach of contract is likely to be, to agree beforehand "to put an agreed figure upon those damages; and, dealing with "the hire of motor-cars, it may well be that it is impossible to "say what the loss of the owner will be if a secondhand car "comes back on his hands, even if it is only a month after the "sale. It is not, one would think, always very easy to sell a "secondhand car, even if it has been only through one hand "before it is offered for sale; it is probably a little more "difficult to sell a secondhand car which has been through more

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[33] [1915] A.C. 79.

[34] Jones and Proudfoot's Notes on Hire Purchase Law, 2nd ed., at p. 122.,

[35] Ibid. 123.

[36] Ibid. 124.

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[37] Ibid. 130.

[38] Ibid. 107.

"hands than one, and it is impossible in advance to say what at "any moment the position of the motor-car market will be, and "therefore it may happen in some circumstances that it is a "dead loss to the owner who had hired out a motor-car on the "terms of the agreement in question in this action, it may mean "something very like a total loss if he gets it back again, because "events may have happened in the meantime which will prevent "him from finding a purchaser at all."

In *Associated Distributors Ld.* v. *Hall*[39] the Court of Appeal had to consider the question whether a sum payable by a hirer under a hire-purchase agreement relating to a bicycle, on his exercising an option to terminate the hiring by returning the bicycle, was, as the county court judge had held, a penalty, and decided that it was not.

Slesser L.J. said[40]: "He" (i.e., the hirer) "has exercised "an option, and the terms on which he may exercise the option "are those set out in clause 7. The question, therefore, whether "these payments constitute liquidated damages or a penalty in "the instances mentioned" (which were instances of determination by the owner) "does not arise in the present case." It is to be observed that this decision left the question open as regards sums payable on determination of the hiring by the owner under a power reserved to him by a hire-purchase agreement, and that Scott L.J., in agreeing, said in terms that the court was expressing no opinion at all on three other cases not before the court, in which the hiring had been determined by the owner and the same learned county court judge had held a sum payable by the hirer in that event to be a penalty.

The three unreported cases to which I have referred were considered by Simonds J. in *In re Apex Supply Co. Ld.*,[41] where the judge had to consider comparable provisions in a hire-purchase agreement comprising certain machinery under which (in effect) on termination of the hiring by the hirer or the owners within nine months from the date of the agreement the hirer was to pay to the owners a sum representing the difference between the payments already made by him and the sum of £1,020 12s. 0d. After referring to the reasoning of Salter J. in *Elsey & Co. Ld.* v. *Hyde*[42] and to the passage I have quoted from the judgment of Greer L.J. in *Chester & Cole Ld.* v. *Wright*,[43] Simonds J.

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[39] [1938] 2 K.B. 83.

[40] Ibid. 88.

[41] [1942] Ch. 108, 119.

[42] Jones and Proudfoot's Notes on Hire Purchase Law, 107.

[43] Ibid. 130.

continued[44]: " At any rate, the Lord Justice does not dissent from, " but rather gives his approval to, the reasoning of Salter J. in " the earlier case in construing an agreement which in no material " way differs from that which I have to construe. Accordingly, " whatever my own view might be, I should feel bound to give to " this document the same meaning, and to come to the conclu- " sion that here no question of penalty versus liquidated damages " arises, but that this is a contract for the payment of a certain " sum in a certain event and, that event having happened, that " sum is payable. I would only add that, if I had to come to " a conclusion on the second question, whether this was a penalty " or a pre-estimate of damage, then, guided by the line of " reasoning which influenced the Court of Appeal in the third of " the four cases to which I have referred, I should come to the " conclusion that the present was a case not of penalty but of " genuine pre-estimate of damage." He added a reference to *Associated Distributors Ld.* v. *Hall*[45] and pointed out that in that case there was no word of disapproval of the reasoning of Salter J. in *Elsey & Co. Ld.* v. *Hyde*.[46]

Returning in the light of these authorities to a consideration, with reference to the particular agreement now before the court, of the two questions involved in the present appeal, I find it convenient to deal first with the second question, that is to say, on the assumption that the sum payable under clause 11 is capable in other respects of constituting a penalty in the relevant sense, is it in point of amount a penal sum as distinct from a genuine pre-estimate of damage? It is to be observed that in all the cases to which I have referred this question was answered in the negative. But the clauses there under consideration were different. None of them purported to exact the full amount of the hire which would have been payable if the hiring had run its full course. In each case the hirer was only required to pay some minimum proportion of the total hire and it was hardly possible to say that the minimum sum made payable, in so far as it exceeded the hire attributable to the actual period for which the hiring continued, was other than a genuine pre-estimate of the unpredictable amount of the loss which the owners might suffer by depreciation of the article hired, and to which the sum payable was expressly referred. Here the sum payable by the hirer on determination by the owners under clause 11 extends to the full amount, so far as not previously paid, of the hire which would have been payable, if the hiring had run its full course, whereas on determination by the hirer under clause 10 his liability so far as instalments of hire are concerned is limited to hire accrued due down to the date of determination plus 40 per cent. of the hire which would have accrued due thereafter, if the hiring had run its full course.

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[44] [1942] Ch. 108, 119.

[45] [1938] 2 K.B. 83.

[46] Jones and Proudfoot's Notes on Hire Purchase Law, 107.

The form of clause 11, whereby the hiring is determinable by the owners, or determined automatically, in a variety of events, some of which are breaches by the hirer of stipulations of widely varying importance, and others of which involve no breach of contract at all, makes it difficult to discern any relevant liability in damages by reference to which the reasonableness or otherwise of the amount made payable under clause 11 can be assessed, and this difficulty in a sense foreshadows the answer which I think should be given to the first question. But for the immediate purpose I propose to take as the standard of comparison the owners' position as it would have been if the hiring had been carried through for the full period of 30 months and the option had then been exercised by the hirer. In that event the plaintiffs would have received under the agreement in all £412 17s. 6d. and the defendant would have become the owner of the vehicle, whereas on determination of the hiring under clause 11 the provisions of that clause, if enforced in their full rigour, would entitle the plaintiffs not only to receive (apart from interest on arrears) a total of £412 7s. 6d. (that is to say, within 10s. 0d. of the full purchase price) but to keep the vehicle as well.

The penal character of clause 11 becomes still more apparent when the possibility is considered of determination under that clause after (say) only one month's hiring, in which event the hirer would on full compliance with the provisions of the clause have paid a total of £412 7s. 6d. (i.e., the cash purchase price of the vehicle at the date of the agreement loaded with interest to allow for payment spread over a period of 30 months) for one month's use of the vehicle. So far as I can see the application of clause 11 according to its expressed terms must have the effect of making the owners better off by at least the value of the car at the date of repossession (less, of course, the 10s. 0d. option money) than they would have been if the hirer had carried out the whole agreement without any default and had ended by exercising the option. The earlier the determination of the hiring by the owners under clause 11 the greater their gain, and in so far as the depreciation of the vehicle will probably be smaller, the owners will so much the sooner be free to sell or otherwise turn it to profitable account again, and the amount of future hire payable immediately without any discount in respect of the interest element included in the instalments will be so much the larger.

It is, of course, possible to imagine a case in which before repossession by the owners the value of the car had been reduced to nothing, as, for example, if it had become a total loss in circumstances in which the owners could collect no insurance money, but apart from that exceptional case, which I think can for the present purpose reasonably be ignored, it seems that the sum payable under clause 11 on the owners' determination of the hiring must always exceed, to the extent I have mentioned, any damage to the owners which could flow from any breach of contract on the part of the hirer on which a determination by the owners under clause 11 might be founded. Therefore, ignoring the exceptional and improbable case I have mentioned, I think the sum payable on determination under clause 11 can, in point of amount, fairly be brought within the intention though not strictly within the letter of the first test of a penalty given by Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ld.* v. *New Garage and Motor Co. Ld.*[47] in paragraph 4 (*a*) as being a sum which is "extravagant and unconscionable in amount in comparison with "the greatest loss that could conceivably be proved to have "followed from the breach." It is, of course, obvious, if the sum payable on any determination under clause 11 is, whenever such determination is founded on some breach of contract by the hirer, to be treated as payable in respect of such breach, that whereas the sum payable is uniformly fixed by reference to the number of instalments remaining to be paid, the breach in respect of which it is payable may be any one of a number of possible breaches, substantial or trivial, and may in itself accordingly occasion damage serious or trifling, and a presumption that the sum payable under clause 11 is a penalty is therefore raised on the principle stated in paragraph 4 (*c*) of Lord Dunedin's judgment in the *Dunlop* case.[47]

For these reasons, I would answer the second of the two questions posed above in the affirmative.

It remains to consider the first and more difficult question whether (being, as I have held, penal in point of amount) the sum payable on determination of the hiring under clause 11 is a penalty in the relevant sense at all. In order to be such, the sum in question must, as I understand the law, be (as I have already described it) a sum which the hirer undertakes to pay to the owners in the event of, and in respect of, some breach by the hirer of the terms of the hire purchase agreement. If the agreement contains a provision of that description, and a breach on the part of the hirer ensues, and the owners sue for payment of the sum stipulated to be paid in respect of such breach, then no doubt arises the question of penalty or no penalty, turning on a comparison between the stipulated sum and the damages capable of flowing from the breach or breaches in respect of which the stipulated sum is, according to the terms of the agreement, expressed to be payable.

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[47] [1915] A.C. 79, 87.

But the provision here in question does not appear to me to answer that description. Clause 11 provides for the determination of the hire in a number of different events and in some of these events it enables the hiring to be determined by a specified notice from the owners to the hirer, while in others of them it causes the hiring to determine automatically. The events in which the hiring may be determined by notice include failure by the hirer to make any payment under the agreement on the due date (which would, of course, be a breach of contract) but they also include the death of the hirer (which would, of course, not be a breach of contract). The events bringing about automatic determination include failure by the hirer to observe or perform any agreement or condition contained in the agreement, but they also include the hirer's bankruptcy, the making of a receiving order against him, his making a composition with his creditors, the presentation of a winding-up petition against the hirer (being a company) none of which is a breach of contract. On the determination of the agreement by notice or otherwise, and whether the event on which the notice was founded or which brought about the automatic determination was a breach of contract on the part of the hirer or not, the sum prescribed by clause 11 becomes payable. It is not payable because the hirer has committed a breach of contract (which he need not necessarily have done) but because the hiring has been determined. Supposing the sum prescribed by clause 11 became payable upon a determination by notice founded on the death of the hirer, or on an automatic determination due to the presentation of a winding-up petition against the hirer (being a company), no question, so far as I can see, of the sum being a penalty in the relevant sense could arise, and that being so it seems to me impossible to invest the same sum with the character of a penalty where the determination by reason of which it becomes payable happens to be brought about by notice founded on or automatically by some breach of contract on the part of the hirer.

My conclusion on this aspect of the case is supported by the reasoning of Salter J. in *Elsey & Co. Ld.* v. *Hyde*,[48] which, although it turned partly on the circumstance, absent from the case now before us, and to my mind of doubtful relevance to the point at issue, that the same sum was there made payable on determination by the hirer, seems to me to be applicable in its essentials to the provisions of the hire purchase agreement in the present appeal. The reasoning of Salter J. in the case just cited appears to have commended itself to Greer L.J. in *Chester & Cole Ld.* v. *Wright*,[49] and for my part I find it convincing. I may add that in *In re Apex Supply Co. Ld.*[50] Simonds J., while finding it his duty as a judge of first instance to follow Salter J., whatever his own view might be, said nothing to suggest that his own view would have been different.

Under the agreement here in question the consideration moving from the hirer was the sum of £412 7s. 6d., payable as to £25 at once and as to the balance by 30 equal monthly instalments, plus the sum of 10s. 0d. payable in the event of his becoming entitled to exercise, and exercising, the option. The consideration moving from the owners was the lending to the hirer of the vehicle for a period of 30 months, subject to determination as thereinafter provided, and the granting to him of the option of purchase. In the event of the hirer determining the hire under clause 10 by returning the vehicle, his liability for payment of the monthly instalments was to cease, but he was to pay all unpaid instalments which had fallen due prior to the return of the vehicle and (inter alia) 40 per cent. of the total amount of the monthly instalments which had not then fallen due, or in other words 40 per cent. of the unpaid balance of the £412 7s. 6d. remaining after payment of all instalments in arrear. In the event of the hiring being determined under clause 11, the hirer was not to be relieved from payment of any part of the balance then remaining unpaid of the £412 7s. 6d., and the whole of such balance was to become immediately payable. In other words, the full sum of £412 7s. 6d. was to be paid in respect of the hiring whether it ran its full course or not, and whether the hirer became entitled to exercise the option or not, except that in the event of the hirer returning the vehicle under clause 10 his liability was to be limited to the extent therein mentioned. An agreement in such terms may be thought unfair and oppressive to the hirer, but I cannot see that it involves a penalty in the relevant sense. As Farwell J. observed in *Mussen* v. *Van Diemen's Land Co.*,[51] where relief was unsuccessfully sought from a provision for the forfeiture of instalments paid under a contract for the sale of land and avoidance of the contract, in the event of default being made in the payment of any of the instalments on the ground that this amounted to a penalty, "It should be observed that this is not "strictly a case of a penalty at all, since the payment in question "was an integral part of the principal contract."

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[48] Jones and Proudfoot's Notes on Hire Purchase Law, 107.

[49] Ibid. 124, 129–30.

[50] [1942] Ch. 108.

Although in the view I take the sum payable under clause 11 is not a penalty in the sense contended for in the present appeal, it might I suppose conceivably have been argued that the provision in question is a penal provision in the sense that it is so oppressive and unconscionable that equity should grant relief from it upon equitable terms. Compare *In re Dagenham (Thames) Dock Company; Ex parte Hulse*[52]; *Kilmer* v. *British Columbia Orchard Lands Ld.*[53]; and *Steedman* v. *Drinkle*,[54] cases in which relief was successfully sought from provisions for forfeiture of instalments of purchase money in contracts for the sale of land comparable for the present purpose to the one considered by Farwell J. in *Mussen* v. *Van Diemen's Land Company*,[55] and note Farwell J.'s explanation in the last-mentioned case of the principle on which those cases proceeded. But if that argument were tenable here at all—and I express no opinion one way or the other about that, for no such argument has been raised in the present case—it surely could not be equitable in the circumstances to grant relief on terms which would put the owners in any worse position than they would have been in if the hirer had returned the vehicle under clause 10 on the date on which they repossessed themselves of it under clause 11. Be that as it may, the question does not arise in the present case, in which the owners' claim has been contested solely on the ground that the sum sued for is a penalty in what I have termed the relevant sense, and as such wholly irrecoverable.

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[51] [1938] Ch. 253, 263.

[52] (1873) L.R. 8 Ch. 1022.

[53] [1913] A.C. 319.

[54] [1916] 1 A.C. 275.

[55] [1938] Ch. 253.

For the reasons I have endeavoured to state I think that contention ill-founded, and accordingly would, for my part, dismiss the appeal.

HODSON L.J. On this appeal two questions arise: (1) Can the sum expressed to be payable on determination by the owners of the hiring, under the provisions of clause 11 of the agreement of July 19, 1947, be regarded as a penalty and accordingly irrecoverable by the plaintiffs? (2) If this sum can be regarded as a penalty is it penal in amount? I agree with the opinions which my Lords have expressed on the second question and with the reasons they have given for reaching the view that the sum in question is penal in amount, and cannot usefully add anything to what has fallen from them.

The first question was answered by the trial judge in favour of the plaintiffs because, as I think, he considered himself bound to do so having regard to the authorities cited to him, culminating in the decision of Simonds J. in *In re Apex Supply Co. Ld.*[56] In that case the judge reviewed the authorities and, on consideration of a document which had much in common with that now under consideration, expressed himself in this way[57]: "Whatever my own view might be I should feel bound to give "to this document the same meaning and to come to the con- "clusion that here no question of penalty versus liquidated "damages arises, but that this is a contract for the payment of "a certain sum in a certain event and, that event having "happened, that sum is payable." As Simonds J. pointed out in another connexion in an earlier part of his judgment, it is undesirable to be over-subtle in dealing with commercial documents of this kind. Accordingly the courts have endeavoured to take a consistent course in construing such documents.

It is therefore with considerable diffidence that I have reached a conclusion in this matter adverse to that which appears to have been widely accepted in this class of case and is, moreover, the conclusion which Jenkins L.J. is satisfied is correct. I am, however, influenced towards my conclusion by the view which appears to have been taken by the Court of Appeal in the case of *Roadways Transport Development Ld.* v. *Browne & Gray.*[58]

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[56] [1942] Ch. 108.

[57] Ibid. 119.

[58] (1927) Jones and Proudfoot's Notes on Hire Purchase Law, 118.

All the members of the court (Bankes, Scrutton and Atkin L.JJ.) held that the sum there payable on termination of a hiring by the owner of a motor-car was a reasonable sum and did not offend against the rule of law dealing with penalties as opposed to liquidated damages. It can, of course, be fairly said that they did not discuss the point now at issue at all. Nevertheless it seems that the approach made by all three members of the court to the problem was based on the view that the law dealing with penalties had application. They had, I think, directed themselves in accordance with that law and then come to the conclusion that the sum in question was not penal in amount.

In order to illustrate my meaning, I propose to read what Scrutton L.J. said on this matter [59]: "I entirely agree with the "judgment of Branson J. in this case and I do not propose to "add anything to it except on the question of penalty. It is "said that the sum of £100 claimed under clause 5 must be a "penalty, and one of the reasons given is that as a matter of "fact on the figures in this case the plaintiff makes more by the "agreement being broken than he would have done if it had "been kept; and that is quite true, but it is true not because "of clause 5 but because of the provision as to the forfeiture of "the deposit; and it is always the case, where you forfeit a "deposit of any substantial amount and keep the thing you have "sold plus the deposit, unless the price was very much in excess "of the market value, you get more by the defendant's breach "than you would have done if he had kept to the bargain, "because you have got the thing you have sold and you have "got a substantial deposit as well. That is the defendant's "look-out for not keeping to the agreement. This particular "clause as to paying the £100 is made to vary according to the "length of time that the purchaser has used the car; for the "longer he has used it and the more the seller has got by way "of rent the less the purchaser in default has to pay. It appears "to me to come exactly within the language used by Lord "Dunedin in the last case so far as I know in the House of "Lords, *Dunlop Pneumatic Tyre Company* v. *New Garage and* "*Motor Company*,[60] in which *Wilson and Love* [61] was discussed. "Lord Dunedin said [62]: 'The essence of a penalty is a payment "'of money stipulated as in terrorem of the offending party. "'The essence of liquidated damages is a genuine covenanted

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[59] Ibid. 122.

[60] [1915] A.C. 79.

[61] [1896] 1 Q.B. 626.

[62] [1915] A.C. 79, 86.

"'pre-estimate of damage.' Then again[63]: 'It is no obstacle "'to the sum stipulated being a genuine pre-estimate of damage "'that the consequences of the breach are such as to make "'precise pre-estimation almost an impossibility. On the "'contrary that is just the situation when it is probable that "'pre-estimated damage was the true bargain between the "'parties,' and Lord Parker of Waddington gave judgment to "the same effect. It seems to me on these principles this is "clearly a genuine pre-estimate of the damage, and that being "so the guarantor must pay." No member of the court expressed the opinion that the contract was outside the penalty area on the simple ground that the agreement provided for a sum of money in a certain event, namely, the determination of the hiring in accordance with the terms of the agreement. I cannot but think that if this had been a complete answer to the appellants' argument the court would have so declared.

The other decision of the Court of Appeal to which we have been referred, namely, *Associated Distributors Ld.* v. *Hall*,[64] was a case in which under an agreement of the same class the hirer elected to determine the agreement, and in those circumstances the court came to the conclusion that no question of penalty or liquidated damages arose. Scott L.J. expressly left open the question, as Simonds J. pointed out in *In re Apex Supply Co. Ld.*,[65] of what might be the view of the court if the agreement had been terminated not by the hirer but by the owner. Romer L.J. also left the question open. The Court of Appeal certainly did not give any decision discouraging to the present appellants although it is true, as Simonds J. also pointed out, that the judgment of Salter J., sitting as a member of a Divisional Court of the King's Bench Division in *Elsey & Co. Ld.* v. *Hyde*,[66] was not adversely criticized. This last is the authority from which flows the line of argument which was accepted in the court below and is contained in the passage from the judgment of Salter J., where he discusses, inter alia, the case of a hire being determined by the owner because the hirer is in arrears with his payments. The material passages of his judgment, taken from pages 111, 112 and 113 of Jones and Proudfoot's Notes on Hire Purchase Law, have already been read by my Lords.

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[63] [1915] A.C. 79, 87.
[64] [1938] 2 K.B. 83.
[65] [1942] Ch. 108.
[66] Jones and Proudfoot's Notes on Hire Purchase Law, 107.

Greer L.J., sitting with Lord Hanworth M.R. as a Divisional Court of the King's Bench Division in the case of *Chester & Cole Ld.* v. *Wright*, expressed himself on this topic saying[67]: "It may very well be that the view which is, I think, the view "of Salter J. in *Elsey's* case,[68] which was cited before us, is the "right way to look at this clause, namely, that it is not either "liquidated damages or a penalty, but it is a sum payable in "respect of one event, namely, the determination and end of the "hiring agreement, whether that end of the hiring agreement "arises from the hirer delivering the car back again, or whether it "arises from the owner taking it out of the possession of the hirer "in the events in which he is entitled to take it out." It will be observed that the whole of this passage is introduced by the phrase "It may very well be," and is therefore not particularly strong support for Salter J.'s opinion. My difficulty is to see the validity of the distinction between a claim to receive payment of a sum of money because of a right to determine arising from breach of contract and a claim to receive payment of the same sum by reason of breach of contract giving a right to determine. The latter situation arises in cases of breach of condition amounting to a repudiation of the contract giving the opposite party the right to accept the repudiation and sue for damages. In so acting he determines the contract. Clause 11 purports to produce exactly this situation in respect of any breach referred to therein, and it seems to me unreal to speak of a remedy arising from the right to determine as opposed to a remedy arising from the breach. It is said that the right to determine arises in clause 11 not only in cases of breaches great or small, but also in a number of other events which have nothing to do with breach of contract, and accordingly since the law as to penalties for breach is inapplicable as such in these numerous instances, so it cannot be applied to that part of the clause to which it might otherwise be appropriate. I am unable to accept this contention, which seems to involve that a draftsman of a written contract can always draw his document in such a way as to defeat the common law by incorporating in the same clause provisions dealing with the right to determine the contract on the occurrence of an infinite number of events only one of which is a breach of contract.

For these reasons I am of opinion that the law as to penalties is applicable and that therefore the first question posed should

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[67] Ibid. 124, 130.

[68] Ibid. 107.

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be answered in favour of the defendant and that the appeal should succeed.

Appeal allowed.

Solicitors: *Kingsford, Dorman & Co., for Robert S. Boyes, Bexhill-on-Sea; Clutton, Moore & Lavington.*

A. W. G.

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Oct. 6, 7; *Nov.* 3.
Somervell, Jenkins and Hodson L.JJ.

In re ADOPTION ACT, 1950. *In re* "K." (AN INFANT).

[1952. Plaint No. H. 2289]

Adoption—Statutory form of consent signed by mother—Consent subsequently withdrawn—Mother at time of proceedings herself an infant—Interim order made by county court judge—Whether mother's consent unreasonably withheld—Welfare of infant—Adoption Act, 1950 (14 *Geo.* 6, *c.* 26), *ss.* 3 (1) (*c*) *and* 6 (1) (2).

Under the Adoption Act, 1950, the consent of the parents to an adoption order, which would extinguish once and for all their parental rights and the relationship of parent and child, is as a general rule indispensably necessary. The fact that a parent has at an earlier stage consented in writing to the adoption does not prevent that consent being withdrawn at any time before the adoption order is actually made. *In re Hollyman* (1945) 61 T.L.R. 229 applied.

Although section 3 (1) (*c*) of the Act confers power on the court to dispense with the consent of a parent, even in cases where the parent has not been guilty of any misconduct or dereliction of duty towards the infant, if satisfied (inter alia) that the consent is being unreasonably withheld, such cases are exceptional. Each case must depend upon its own facts and circumstances, but the withholding of consent could not be held to be unreasonable (1) merely because the order, if made, would conduce to the welfare of the child (*Hitchcock* v. *W. B.* [1952] 2 Q.B. 561 approved); (2) because the parent has in justifiable circumstances placed the child in the care of foster parents, without in any sense abandoning it; or (3) merely because a documentary consent under section 4 of the Act has been given and subsequently withdrawn, for otherwise the result would be tantamount to making the documentary consent irrevocable, which it plainly was not intended to be by the Act.

Under the Adoption of Children (County Court) Rules, 1949, parents are not only served with notice of the adoption application but are made respondents in the proceedings, and therefore a parent who was an infant should be given a guardian ad litem. Where all that was necessary was that the judge should be satisfied of the parent's consent no useful purpose would be served by the appointment of a guardian ad litem, for the order would not be made unless the parent did consent. But in rare cases, where an infant parent opposed the adoption and an order was sought against the will of that parent on the ground that his or her consent was unreasonably withheld, the question whether a guardian ad litem should be appointed or the High Court practice followed mutatis mutandis was one in regard to which the position should be made clear in the rules.

APPEAL from Judge Willes, sitting in the Derby and Long Eaton county court.

On October 29, 1949, an English girl married Mikolaj Kuzmicz, a Pole, resident and working in Derby. Her child, Andre, the subject of the petition, was born on March 26, 1950. He was therefore just over two years of age when the matter came before the county court judge. Three weeks after the child was born Mrs. Kuzmicz left her husband, in consequence, as she said, of his treatment of her, and proceedings taken before the Mansfield justices resulted in her being given the custody of the child and the father being ordered to pay 15s. a week for its maintenance. Following a temporary reconciliation a second order to the same effect was made by the Derby justices on November 7, 1950. The mother, who was living with her parents, wanted, or needed, to go out to work, and she therefore approached Miss Kirk, the children's officer for the borough of Derby, who, having regard to the mother's background and matrimonial history, considered that the proper and most helpful course to adopt was to put the child into the care of trustworthy foster-parents, in the hope that in the near future the parents would become reconciled and the mother retake the care of the child. Accordingly the mother was introduced to Mr. and Mrs. Rogers, the present applicants, who agreed to take the child, then aged 5½ months, into their household, the father paying them 15s. a week and the mother 5s. a week. So matters continued for about a year, the mother calling to see the child at intervals.

In the autumn of 1951 Mrs. Kuzmicz commenced an association with another Pole, a married man, with whom it was said she was still living and whom she hoped to marry. On March 1, 1952, before a justice of the peace, Mrs. Kuzmicz signed her consent to the adoption of the child by Mr. and Mrs. Rogers, but was apparently told by the magistrate that her consent could be withdrawn, and on April 28, 1952, she did withdraw her consent.

On May 29, 1952, Judge Willes, on an application by Mr. and Mrs. Rogers, made an interim order under section 6 of the Adoption Act, 1950, giving them the custody of the child for a probationary period of three months. He said he was quite satisfied that in the discharge of his duty and in the exercise of his discretion to dispense with the consent of a parent whose required consent was withheld, he had to decide the question whether such consent was or was not unreasonably withheld, in the light of the circumstances in which the adoption was applied for and the consent withheld, having regard to the interests and welfare and also (where it was possible) the wishes of the child whose future life hung in the balance. He reached the conclusion that an adoption order ought to be made in favour of Mr. and Mrs. Rogers, but in view of the possibility of an appeal he made an interim order only.

At the time of the proceedings the mother was herself an infant. The judge was not informed of that fact until after the hearing, and no guardian ad litem for the mother was appointed.

The mother appealed.

J. Maude Q.C. and *Miss Lewis* for the mother. The county court judge misdirected himself and was in error when he held that the mother's consent to the adoption order was unreasonably withheld within the meaning of section 3 (1) (*c*) of the Adoption Act, 1950. It is submitted that he had before him no evidence capable of satisfying him that the withholding of her consent by the mother was so unreasonable that he was entitled to dispense with it. He apparently based his decision entirely on the interest and welfare of the child. In the case of an application for the custody of a child the overriding consideration is the interest of the child, but on an application for an order for adoption, which will extinguish once and for all the parental relationship, other matters must be taken into consideration (see *Hitchcock* v. *W. B.*[1]). Section 2 (4) of the Act of 1950 provides that "subject to the provisions of section 3 "of this Act, an adoption order shall not be made (*a*) in "any case, except with the consent of every person or body "who is a parent or guardian of the infant." Section 3 (i) enables the court to dispense with any consent required by paragraph (*a*) of subsection (4) of section 2 if it is satisfied, in the case of a parent or guardian, that he or she has abandoned, neglected or persistently ill-treated the child, or (*c*) that consent is unreasonably withheld. A parent's written consent to an adoption order can be withdrawn at any time before the order is actually made (see *In re Hollyman* [2]). In any case the proceedings before the county court judge were defective, because the mother throughout those proceedings was herself an infant and had not been provided with a guardian ad litem.

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[1] [1952] 2 Q.B. 561.

W. K. Carter Q.C. and *Brian Bush* for Mr. and Mrs. Rogers. The decision of the county court judge was right, it is submitted, and for the reasons which he has given. The Act of 1950 is a consolidation Act, and the attention of the learned judge having been called to that fact he looked at section 2 (3) of the Adoption of Children Act, 1926, and came to the conclusion that he had unfettered discretion to dispense with the consent of the mother. The learned judge also concluded from the judgment of the Lord Chief Justice in *H.* v. *H.*[3] that he had to exercise a judicial discretion. A reasonable parent would place the interest and welfare of the infant before his or her own wishes, and the judge has rightly considered the welfare of the infant in determining whether the consent of the mother was unreasonably withheld. He arrived at his decision on the facts, and the appellate court should be slow to interfere. If he had applied a wrong principle the matter should be remitted to him to apply the right principle.

Lightman for the Derby Education Committee, as guardians ad litem of the child, supported the order of the county court judge.

SOMERVELL L.J. I will ask Jenkins L.J. to read the judgment of the court.

JENKINS L.J. This is an appeal by Mrs. Eva Florence Kuzmicz, the mother of a male infant born on March 26, 1950, and, therefore, now a little over 2½ years old, from an interim order under section 6 of the Adoption Act, 1950, made by Judge Willes in the Derby and Long Eaton county court, and dated May 29, 1952, upon an application under the Act by the respondent spouses, Mr. and Mrs. Rogers, for an adoption order authorizing them to adopt the infant.

The mother, on March 1, 1952, duly signed before a justice of the peace the prescribed statutory form of consent to the proposed adoption, but withdrew that consent on April 28, 1952, and was represented at the hearing by a solicitor (Miss Booth), who opposed the application on her behalf.

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[2] (1945) 61 T.L.R. 229.

[3] [1947] K.B. 463.

For the reasons stated in his careful reserved judgment, which appears to have been delivered on June 14, 1952, the judge nevertheless held that in the circumstances of the case an adoption order could and should be made without the mother's consent, inasmuch as he was satisfied that her consent was unreasonably withheld within the meaning of the Act, and accordingly he ought, in the exercise of his discretion, to dispense with that consent, the case being in all other respects a proper one for the order. The order actually made was, as mentioned above, not a full adoption order but an interim order under section 6 of the Act; and its effect was merely to give the custody of the infant to the present respondents for a probationary period of three months. As may be seen from his judgment, the judge made his order in this limited form in deference to the possibility, or probability, of the present appeal, and not on account of any doubt as to the suitability of the proposed adopters. That being so, and having regard to the terms of subsection (2) of section 6 of the Act, the considerations bearing on the result of this appeal would seem to be precisely the same as they would have been if the order under appeal had been a full adoption order.

The appeal raises, in effect, two questions, the second of which need, strictly speaking, only be determined if the judge is held to have been right on the first. The two questions are: (i) Whether, having regard to the relevant provisions of the Act of 1950, the facts found by the judge afforded any evidence capable in law of satisfying him that the mother's consent was unreasonably withheld, so as to empower him, if so satisfied, to dispense with such consent in the exercise of his discretion; (ii) if so, whether the proceedings before the judge were defective owing to the circumstance that the mother, who was born on August 5, 1931, and thus throughout those proceedings was herself an infant, was not provided with a guardian ad litem.

[His Lordship read the material sections of the Adoption Act, 1950,[4] and continued:] The facts on which the learned judge's decision was based will be best appreciated by reading at length from his considered judgment his own narrative of the

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[4] Adoption Act, 1950, s. 1 (1): "Subject to the provisions of this "Act, the court may, upon an application made in the prescribed manner "by a person domiciled in England "or Scotland, make an order (in this "Act referred to as an adoption "order) authorising the applicant to

"adopt an infant. (2) An adoption "order may be made on the application of two spouses authorising them "jointly to adopt an infant. . . ."

S. 2 (4): "Subject to the provisions "of section three of this Act, an "adoption order shall not be made— "(*a*) in any case, except with the "consent of every person or body "who is a parent or guardian of the "infant or who is liable by virtue of "any order or agreement to contribute to the maintenance of the "infant; (*b*) on the application of "one of two spouses, except with the "consent of the other spouse, . . . "(6) An adoption order shall not be "made in respect of any infant "unless—(*a*) the infant has been continuously in the care and possession "of the applicant for at least three "consecutive months immediately preceding the date of the order; . . ."

S. 3 (1): "The court may dispense "with any consent required by paragraph (*a*) of subsection (4) of section two of this Act if it is satisfied "—(*a*) in the case of a parent or "guardian of the infant, that he has "abandoned, neglected or persistently "ill-treated the infant; (*b*) in the "case of a person liable by virtue of "an order or agreement to contribute "to the maintenance of the infant, "that he has persistently neglected "or refused so to contribute; (*c*) in "any case, that the person whose "consent is required cannot be found "or is incapable of giving his consent or that his consent is unreasonably withheld. . . ."

Subs. (3): "The consent of any "person to the making of an adoption "order in pursuance of an application "(not being the consent of the infant) "may be given (either unconditionally or subject to conditions with "respect to the religious persuasion "in which the infant is to be brought "up) without knowing the identity of "the applicant for the order; and "where consent so given by any "person is subsequently withdrawn "on the ground only that he does not "know the identity of the applicant, "his consent shall be deemed for the "purposes of this section to be unreasonably withheld."

Subs. (4): "While an application "for an adoption order in respect of "an infant is pending in any court, "any parent or guardian of the infant "who has signified his consent to the "making of an adoption order in pursuance of the application shall not "be entitled, except with the leave of "the court, to remove the infant from "the care and possession of the applicant; and in considering whether "to grant or refuse such leave the "court shall have regard to the "welfare of the infant."

S. 4 (1): "Where any person "whose consent to the making of an "adoption order is required by paragraph (*a*) of subsection (4) of section two of this Act does not attend "in the proceedings for the purpose "of giving it, then, subject to the "provisions of subsection (3) of this "section, a document signifying his "consent to the making of such an "order shall, if the person in whose "favour the order is to be made is "named in the document or (where "the identity of that person is not "known to the consenting party) is "distinguished therein in the prescribed manner, be admissible as "evidence of that consent, whether "the document is executed before or "after the commencement of the "proceedings."

Subs. (2): "Where any such "document is attested by a justice of "the peace (or, if executed outside "the United Kingdom, by a person "of any such class as may be prescribed), the document shall be "admissible as aforesaid without "further proof of the signature of the "person by whom it is executed; and "for the purposes of this subsection, a document purporting to be "attested as aforesaid shall be "deemed to be so attested, and to be "executed and attested on the date facts as found by him, which is as follows: "On October 29, "1949, Mrs. Kuzmicz (Eva Florence Fewkes), an English girl, "whose parents live in Derby, married her husband, Mikolaj "Kuzmicz, a Pole, resident and working in Derby. At the date "of this marriage, and perhaps explaining it, the wife was "pregnant. Her child, Andre, the subject of this petition, was "born on March 26, 1950. He was just over two years of age "when I heard the petition. A healthy, happy, and, for his age, "very intelligent baby, quite willing to play with people whom "he knew, well able to distinguish and be distrustful or shy in

"and at the place specified therein, "unless the contrary is proved."

Subs. (3): "A document signifying "the consent of the mother of an "infant shall not be admissible under "this section unless—(*a*) the infant "is at least six weeks old on the date "of the execution of the document; "and (*b*) the document is attested on "that date by a justice of the peace "or, as the case may be, by a person "of a class prescribed for the purposes of subsection (2) of this "section. . . ."

S. 5 (1): "The court before making "an adoption order shall be satisfied "(*a*) that every person whose consent is necessary under this Act, "and whose consent is not dispensed "with, has consented to and understands the nature and effect of the "adoption order for which application "is made, and in particular in the "case of any parent understands that "the effect of the adoption order will "be permanently to deprive him or "her of his or her parental rights; "(*b*) that the order if made will be "for the welfare of the infant, due "consideration being for this purpose "given to the wishes of the infant, "having regard to the age and understanding of the infant; . . ."

S. 6 (1): "Subject to the provisions of this section, the court may, "upon any application for an adoption order, postpone the determination of the application and make an "interim order giving the custody of "the infant to the applicant for a "period not exceeding two years by "way of a probationary period upon "such terms as regards provision for "the maintenance and education and "supervision of the welfare of the "infant and otherwise as the court "may think fit."

Subs. (2): "All such consents as "are required to an adoption order "shall be necessary to an interim "order but subject to a like power on "the part of the court to dispense "with any such consent."

Subs. (3): "An interim order shall "not be made in any case where the "making of an adoption order would "be unlawful by virtue of subsection "(6) of section two of this Act."

Subs. (4): "An interim order shall "not be deemed to be an adoption "order within the meaning of this "Act."

S. 10 (1): "Upon an adoption "order being made, all rights, duties, "obligations and liabilities of the "parents or guardians of the infant "in relation to the future custody, "maintenance and education of the "infant, including all rights to appoint a guardian and (in England) "to consent or give notice of dissent "to marriage, shall be extinguished, "and all such rights, duties, obligations and liabilities shall vest in "and be exercisable by and enforceable against the adopter as if the "infant were a child born to the "adopter in lawful wedlock; and in "respect of the matters aforesaid "(and, in Scotland, in respect of the "liability of a child to maintain his "parents) the infant shall stand to "the adopter exclusively in the position of a child born to the adopter "in lawful wedlock. . . ."

"the presence of strangers. Three weeks after the child was "born, as she said in consequence of his attitude towards and "treatment of her, Mrs. Kuzmicz left her husband. This misfortune, and its cause, resulted in a finding by the Mansfield "Justices that the mother was entitled to the custody of the child "and the father liable to pay the sum of 15s. 0d. a week for its "maintenance.

"The husband and wife (who had then been married for less "than a year) seemed to have been temporarily reconciled because "a second order to the same effect was made on the wife's "application by the Derby Justices on November 7, 1950. When "the mother was living with her parents, and because, though "her baby was only a few months old, she wanted or has to "go out to work, she approached Miss Kirk, the excellent and "experienced children's officer for the borough of Derby. Though "adoption may have been mentioned, at this time Miss Kirk, "having regard to the mother's background and matrimonial "history, considered that the proper and most helpful course to "adopt was to get the child into the care of suitable and trustworthy foster-parents in the hope and belief that in the near "future the recently married parties would become reconciled "and the mother retake and care for the child. Accordingly "Mrs. Kuzmicz was introduced by Miss Kirk to the present "applicants Mr. and Mrs. Rogers. Mr. Rogers is, I think, permanently employed in the office of the local housing authority. "He and his wife were married in 1937. They have one child, "a girl, now 13 years of age; to their mutual disappointment and "especially the adopting father they have no son. Miss Kirk "introduced them to Mrs. Kuzmicz because she had on other "occasions invoked and obtained their temporary help as foster-"parents in similar cases.

"As the result of a discussion with this baby's parents and "Mrs. Rogers, who would not contemplate adopting the child, "partly for financial reasons but much more for the reason that "the parents were hoped and expected to become reconciled, "agreed to take Andre (5½ months old) into their household and "to care and provide for him, the father paying them 15s. 0d. "a week, to which the mother added from her own earnings a "further sum of 5s. 0d. a week, making the total contribution £1. "So matters continued for about a year. The mother called "from time to time and saw her baby at intervals of about three "weeks or less. I think these occasions were probably when she "brought the money for his maintenance. She did not take the "child out; it remained, and has always remained, in its home "regarding and treating the Rogers as its parents.

"About August or September, 1951, Mrs. Kuzmicz commenced "an association (which she described to me as 'courting') with "another Pole, a married man, who was, I think, separated from "his wife. I do not think that Mrs. Kuzmicz intended or wished "to disguise or deny the real nature of this association. She "frankly admitted that since last January she has lived as man "and wife (I think in rooms) with this married Pole. She hopes "to divorce or be divorced by her husband, and that the Pole "she lives with will divorce or be divorced by his wife, and that, "when these matrimonial readjustments have been duly effected, "she will marry the Pole with whom she is now living.

"On March 1, 1952, before a justice of the peace and in full "compliance with all the relevant safeguards, Mrs. Kuzmicz "signed her consent to the adoption. She told me that the "magistrate had told her that her consent so given could be "withdrawn. The form itself indicates this in a reference to the "use that may be made of the document. I am quite satisfied "that she fully understood the consequences of an adoption order, "and that her consent to such consequences was required, and "that with such knowledge she gave such consent, but I do not "think it would be right or just to hold that in doing so she was "not influenced by the knowledge she had, or information she "was given, to the effect that her signed consent could be with-"drawn before the hearing of the petition. Though I discussed "the matter with Miss Booth, it was not suggested, nor could "be suggested, that Mrs. Kuzmicz's signed consent was the "result of pressure or undue influence by any person interested "in obtaining it. I think the truth of what happened is this: "After the child had been for over a year in the care of the Rogers "it had got to love them and treat them as its parents and they "had become very attached to the child. The position of the "mother made it certain that reconciliation with her husband "was impossible. Mrs. Rogers approached Mrs. Kuzmicz and "discussed adoption, pointing out that the development and exist-"ing attitude of the child and the mother's then matrimonial "position made it necessary in the interests of the child and of "everybody concerned to consider and decide the question of its "adoption. Mrs. Kuzmicz, no doubt, was in a difficulty in the "sense that she could not retake the child. But I think her "decision to consent to its adoption was her free judgment of "her child's interests. After she had signed the formal consent "she tells me she had begun to have misgivings, and for that "reason consulted her own father, who told her that he thought "her decision was right. She did not withdraw her consent to "the adoption until she had consulted her solicitor, Miss Booth, "who wrote to that effect on April 28, 1952.

"The father, who, so far as I know, has taken no interest in "the child since its birth, attended the hearing to support the "petition, having given his formal written consent to the proposed "adoption. No doubt his attitude is not uninfluenced by the "fact that an adoption order, when made, will relieve him of his "liability to pay 15s. 0d. a week for the child's maintenance."

Earlier in his judgment the judge discussed at length the effect in relation to the parent of an infant of the provision in section 3 (1) (*c*) of the Act, under which the court may dispense with any consent required by section 2 (4) (*a*) if satisfied "in *any* case" that the consent of the person whose consent is required "is "unreasonably withheld." He referred to *In re Hollyman*,[5] where the Court of Appeal held in a case under the Adoption of Children Act, 1926, that a parent's written consent to an adoption could be withdrawn at any time before the adoption order was actually made. He also refers to *H.* v. *H.*,[6] where a King's Bench Divisional Court held that the general provision in section 2 (3) of the Act of 1926 enabling the court to dispense with the consent of any person "whose consent ought in the opinion of the court "and in all the circumstances of the case to be dispensed with" extended to dispensing with the consent of a parent in a proper case, and in effect holds (as is clearly right) that the corresponding provision in section 3 (1) (*c*) of the Act of 1950, notwithstanding its different language, has not altered the law in this respect. He expressed his view of the intention of section 3 (1) (*c*) in these terms: "I think the proviso in its present form was regarded" (i.e., by the legislature) "as creating and conferring upon the "court a judicial discretion to dispense with a consent otherwise "required, in any case in which such consent was unreasonably "withheld by the person withholding it, having regard to the "welfare of the child, the subject of the adoption, and whose "wishes the court is required to consider by the express terms "of the section" (i.e., section 5) "in which the duties and "functions of the court are prescribed." A little later in his

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[5] 61 T.L.R. 229.

[6] [1947] K.B. 463.

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preliminary discussion he amplifies this statement of the intention of section 3 (1) (*c*) by the following definition of his duty under that provision: "I am quite satisfied that in the discharge of "my duty, and in the exercise of my discretion to dispense with "the consent of a parent whose required consent to an adoption "is withheld, I have to decide the question whether such consent "is or is not unreasonably withheld, in the light of the circumstances in which the adoption was applied for and the consent "withheld, having regard to the interests and welfare and also "(in a case where this is possible) to the wishes of the child "whose adoption and whose future life hangs in the balance."

He then proceeds to discuss the circumstances in which the court could properly interfere with parental rights by making an adoption order against the will of the parent, and draws a distinction between cases in which the objecting parent "has got the "child in her care and custody" and cases in which such care and custody is in other hands. Regarding cases of the latter class, he says this: "I do not think the power to dictate the "future or welfare of a child not in the actual possession of the "parent, but which has from a very early age been entrusted by "her to the loving care of foster-parents whom the child has "learnt to love and treat as its father and mother, is uncontrollable in the sense that such a parent can withhold her consent "to the adoption of her child by withdrawing a consent previously "given in accordance with all the prescribed safeguards, whatever view the court may take of the welfare of the child whose "adoption is in question."

He drew a further distinction between cases in which consent has been consistently refused by a parent from first to last and cases in which consent has been given but later withdrawn. With regard to this distinction he says: "In my view though such a "decision" (i.e., to dispense with an objecting parent's consent) "would obviously be a grave decision requiring exceptional justification, it is not legally impossible for the court to dispense "with the consent required from a party, not falling within any "of the above categories, who has always refused to give such "consent. Be this as it may, and though all of these cases are "necessarily serious questions for a court exercising discretionary "powers, it is a different matter when the consent which the "court is asked to dispense with has been given by a mother "who afterwards withholds it in the exercise of the right "judicially established by the Court of Appeal in 1945 in *In re* "*Hollyman*.[7]"

He then proceeded to state his findings of fact in the passage already quoted at length, and continued: "In the light of these "facts, as I understand the Adoption Act, 1950, it is my duty, "treating the withdrawal of the mother's consent previously "given as a withholding of such consent, to decide whether such "consent is unreasonably withheld, having regard to the question "whether the order, if made, would be for the benefit of the "child."

Finally, the judge discussed the question of the infant's welfare, with particular reference to the fact that the infant had a settled home with Mr. and Mrs. Rogers, whom he had come to regard as his parents, and of whose suitability as adoptive parents the judge had clearly formed a most favourable impression, and reached the conclusion that an adoption order ought to be made in favour of Mr. and Mrs. Rogers, but (as already mentioned) confined himself for the time being to the making of an interim order only, in view of the possibility or probability of the present appeal.

We should add that the judge, on the analogy of *Allen* v. *Allen*[8] and *Willoughby* v. *Willoughby*,[9] decisions concerning the custody of children (with respect to which the welfare of the infant is, under section 1 of the Guardianship of Infants Act, 1925, the first and paramount consideration) held (in effect) that inasmuch as those cases showed that comparable circumstances were no ground for holding that it would be contrary to the infant's welfare to allow a mother the custody of her child, he ought in arriving at his decision in the present case to disregard the irregular association formed by the mother with another man since parting with her husband. We agree with the judge that this matter should for the present purpose be disregarded, not, however, on account of the analogy drawn from custody cases, which we think misleading, but simply because this matter does not in itself have any bearing on the question whether the mother's consent to the adoption was or was not unreasonably withheld.

We may now return to the first question in the appeal, that is to say, the question whether, having regard to the relevant provisions of the Act of 1950, the facts as found by the judge afforded any evidence capable in law of satisfying him that the mother's consent was unreasonably withheld. In our opinion this question should be answered in the negative, and the judge misdirected himself and proceeded on wrong principles in holding that the case was one in which he could, and should in the exercise of his discretion, dispense with the mother's consent on that ground.

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[7] 61 T.L.R. 229.

[8] (1948) 64 T.L.R. 418.

[9] [1951] P. 184.

It is to be observed, first, that as a general rule the consent of the persons mentioned in section 2 (4) (*a*) of the Act, and in particular of any parent of the infant, is indispensably necessary to the making of an adoption order under the Act. It is to be observed, secondly, that section 3 (1) in conferring power to dispense with such consent enables this to be done in certain specific cases, including the case of a parent if the court is satisfied that he has abandoned, neglected or persistently ill-treated the infant, and concludes (in paragraph (*c*)) with a general provision enabling consent to be dispensed with in any case if the court is satisfied (inter alia) that it is unreasonably withheld. It is to be observed, thirdly, that under section 10 (1) of the Act the effect of an adoption order (put shortly) is to extinguish all the rights, duties, obligations and liabilities of the parent in regard to the infant, to vest those rights, duties, obligations and liabilities in the adopter, and to convert the infant into the legal equivalent of a child born to the adopter in lawful wedlock, to whom the natural parent becomes in the eye of the law a mere stranger.

It is no doubt true that section 3 (1) (*c*) extends to the case of a parent, and gives the court jurisdiction to dispense with the consent even of a parent who has not been guilty of any such misconduct or dereliction of duty towards the infant as is mentioned in section 3 (1) (*a*), if satisfied that such parent's consent is unreasonably withheld. But, we ask ourselves, in what circumstances is a parent, not guilty of any such misconduct or dereliction of duty, to be held to have acted unreasonably in withholding his or her consent to an order the effect of which, if made, will be to extinguish once and for all his or her parental rights, duties and obligations in regard to the infant, and indeed the very relationship between them of parent and child, and to make the infant thenceforth the child of the adopters, in substitution for and to the utter exclusion of its natural parents? Prima facie it would seem to me eminently reasonable for any parent to withhold his or her consent to an order thus completely and irrevocably destroying the parental relationship. One can imagine cases short of such misconduct or dereliction of duty as is mentioned in section 3 (1) (*a*) in which a parent's withholding of consent to an adoption might properly be held to be unreasonable, but such cases must, in our view, be exceptional.

It is unnecessary, undesirable and indeed impracticable to attempt a definition covering all possible cases of that kind. Each case must depend on its own facts and circumstances. But it is at all events possible to specify certain facts and circumstances which plainly cannot suffice to make a parent's withholding of consent unreasonable. Pursuing this negative course and relating it to the facts and circumstances of the present case, we would say, first, that the withholding of a parent's consent to an adoption order cannot be held unreasonable merely because the order if made would conduce to the welfare of the child. Otherwise a parent in poor circumstances, but guilty of no misconduct or dereliction of duty towards his child, could be compelled against his will to submit to an adoption order being made in respect of that child in favour of any adopters who by reason of more affluent circumstances could make better provision for the child than he could ever hope to do.

Secondly, we would say that such withholding of a parent's consent cannot be held unreasonable merely because the parent has in circumstances such as those of the present case placed the child in the care of foster-parents, without in any sense abandoning it, but on the contrary contributing towards its support and visiting it from time to time. Otherwise the remarkable consequence would ensue that foster-parents entrusted for reward with the care of a child by a parent not for the time being able to provide it with a suitable home could in due course confront the parent with an application to adopt the child which the parent would be unable to oppose. We do not, we confess, appreciate the judge's reasoning on this aspect of the case. The mother, separated from her husband, found it necessary or desirable to go out to work, and, on the advice of the local children's officer, placed the child in the care of the respondents as "suitable and "trustworthy foster-parents," visiting the child at intervals of three weeks or less and contributing the weekly sum of £1, consisting of 15s. 0d. payable by her husband under the justices' order and 5s. 0d. added by herself. We wholly fail to see why this arrangement, continued though it was for a matter of two years, should make it unreasonable for the mother to withhold her consent to the adoption of the child by those same foster-parents.

No doubt the child was settled and happy with them, and his removal might cause him temporary unhappiness. But that, so far as we can see, has no bearing whatever on the question whether the mother's withholding of consent to the adoption was or was not unreasonable. To treat it as relevant to that question, in our view, is to confound adoption with custody. If custody was in question, the fact that the child had a settled home with the foster-parents would no doubt be a consideration in favour of leaving him with them; but even so it would in itself hardly outweigh the countervailing consideration that the best place for a young child is ordinarily with its mother. Be that as it may, the question here is not of custody but of adoption, which is an entirely different matter. In this connexion we would refer to section 2 (6) (*a*) of the Act, which prohibits the making of an adoption order unless the infant has been in the care and custody of the applicant for at least three consecutive months immediately preceding the date of the order. That provision seems to us to be wholly inconsistent with the view that a parent's consent can be regarded as unreasonably withheld merely because the care of the infant has been in other hands for a substantial period.

We would say, thirdly, that the withholding of a parent's consent to an adoption order cannot be held unreasonable merely because a documentary consent under section 4 of the Act has been given by the parent and subsequently withdrawn. It should be noted that section 4 only provides that the document is to be admissible evidence of the consent if the person concerned does not attend in the proceedings for the purpose of giving it. There is no suggestion that the document is to be conclusive evidence, still less that once given it cannot be withdrawn. We think the decision in *In re Hollyman* [10] to the effect that a parent's written consent to an adoption under the Act of 1926 could be withdrawn at any time before the actual making of the order is no less applicable to the Act of 1950. The possibility of a consent once given being subsequently withdrawn is indeed recognized in the Act itself, for section 3 (3), which enables the consent of any person to be given to an adoption order without knowing the identity of the applicant for the order, provides that "where "consent so given by any person is subsequently withdrawn "on the ground only that he does not know the identity of the "applicant, his consent shall be deemed for the purposes of this "section to be unreasonably withheld."

If in circumstances such as these of the present case a

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[10] 61 T.L.R. 229.

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ADOPTION ACT, 1950, *In re.*
In re "K." (AN INFANT).

documentary consent given under section 4 and afterwards withdrawn were to be held against the parent who gave it, and made a ground for regarding his or her subsequent withholding of consent as unreasonable, the result would be tantamount to making the documentary consent irrevocable, which it plainly is not intended to be by the Act, and which it is plainly stated not to be in the prescribed form, which contains the words "I understand that "when the application for an adoption order in respect of" (the infant) "is heard by the judge this document may be used as "evidence of my consent to the making of the order unless I have "notified the court that I no longer consent." That extract from the prescribed form strongly suggests that in the event of notification that the consenting party no longer consents the document is not to be used as evidence at all. If it can be so used, it can only be evidence of the fact that the person concerned, who at the time of the hearing is withholding consent, did at the date of signing the document consent to the proposed adoption, and has subsequently changed his or her mind.

But why should a parent not change his or her mind on a vital question of this sort? The question for the judge at the hearing surely is whether in the circumstances as they then stand the parent's withholding of consent can properly be considered as unreasonable. To that question the fact that he or she on some earlier date signed a documentary consent, since withdrawn, seems to us to be wholly irrelevant. The mere fact that the previous consent was given by no means argues that it could not have been reasonably withheld, and if it could have been reasonably withheld it must be capable of being reasonably withdrawn. Our view on this aspect of the case is fortified by the special provision in section 3 (3), to which we have already referred. In the special case dealt with by that provision of a consent to an order for adoption by an applicant of unknown identity, if the person giving such consent subsequently withdraws it on the ground only that he does not know the identity of the applicant, his consent is to be deemed to be unreasonably withheld. The special character of this provision seems to us to afford a strong indication, if indication be needed, that in cases not covered by it a person is not to be regarded as unreasonably withholding consent merely because he or she has previously given a consent which has been withdrawn prior to or at the hearing.

We have now dealt with the three grounds upon which we take the judge's decision to have been based, and we find ourselves unable to regard them either individually or in combination as grounds capable in law of satisfying him that the mother's consent was in this case unreasonably withheld. This court has had the advantage, denied to the judge, of being referred to the case in the Queen's Bench Divisional Court of *Hitchcock* v. *W. B.*,[11] which was decided only two days before the present case was heard by the judge. That decision, both in its result and in the reasoning on which it is based, accords with the reasons and conclusion above expressed, and we find ourselves in complete agreement with it. It follows that in our view the first of the two questions posed above should be answered in the negative, and this appeal should accordingly be allowed.

That being so, the second question, concerning the effect on the validity of the proceedings of the infancy of the mother herself, and the omission to provide her with a guardian ad litem, need not strictly be answered. But as it is a question of not uncommon occurrence we may perhaps usefully make some reference to it. The appointment of a guardian ad litem of the infant proposed to be adopted is provided for in section 8 (4) and (5) of the Act and in rules 6 to 9 of the Adoption of Children (County Court) Rules, 1949, which under paragraph 11 of Sch. V to the Act of 1950 have effect as rules made under that Act. In the present case the Derby Education Committee was so appointed and was represented at the hearing of the appeal. No provision appears to be made in the Act for the case of an infant parent, except that section 2 (1) (*c*) contemplates that an adoption order in respect of an infant may be made in favour of its mother or father although she or he is under the age of 21.

Cases in which the mother of the infant, proposed to be adopted otherwise than by the mother herself, is under the age of 21 have been of frequent occurrence, and in such cases the practice under the Act of 1926, and no doubt also under the Act of 1950, has been to accept the consent of the infant mother as a valid consent for the purposes of those Acts, rather than to treat the mother as "incapable" of giving consent under section 3 (1) (*c*) of the Act of 1950 or the corresponding provision in section 2 (3) of the Act of 1926: see *In re D.X.* (*an infant*).[12] We think this is clearly right. It would surely be monstrous to dispense with an infant mother's consent on the ground that infancy amounts to incapacity for this purpose, especially as under section 5 (1) (*b*) of the Act of 1950 the wishes of the infant child (necessarily of far more tender age) are to be considered.

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[11] [1952] 2 Q.B. 561.

[12] [1949] Ch. 320.

The judge in the present case was not informed of the infancy of the mother until after the hearing of May 29, 1952, at which the order under appeal was made. In his considered judgment of June 14, 1952, he referred to *In re D.X.*,[12] and after mentioning Ord. 5, r. 13, of the County Court Rules as suggesting, in conjunction with the provisions of the Adoption of Children (County Court) Rules, 1949, under which the mother, as a parent, is made a respondent in the proceedings, that an infant mother should be provided with a guardian ad litem, and saying that he thought it very desirable that the matter should receive consideration from the Court of Appeal, decided "to follow what appeared to be the "prevailing practice and ignore from a procedural and technical "point of view the fact that the respondent mother was and had "at all material times been an infant."

We have inquired as to the practice followed in the Chancery Division where infant parents are concerned, and understand that it is not the practice in that Division to appoint a guardian ad litem of an infant parent. Under the Adoption of Children (High Court) Rules, 1950, the only parties to the application are the proposed adopter as applicant and the infant proposed to be adopted as respondent. (See rule 2.) A parent receives notice of the application under rules 9 and 13, and is entitled to appear before the judge to show cause why an adoption order should not be made, but as he or she is not a party to the proceedings the appointment of a guardian ad litem of an infant parent is not considered necessary. The guardian ad litem of the infant proposed to be adopted (ordinarily the Official Solicitor (see rule 5)) is charged (see rule 10) with duties of investigation which include interviewing the parent or parents. It is thought (no doubt rightly) that in all ordinary cases the judge, assisted by the Official Solicitor's investigations, and himself interviewing any infant parent when it appears proper to do so, is well able to safeguard the interests of the infant parent without the interposition of a guardian ad litem, which in view of the confidential character of the proceedings would be an undesirable complication. We are told that in exceptional cases, such as the present case, in which an infant mother opposes the application and the applicants seek to obtain an order against her will, on the ground that her consent is unreasonably withheld, suitable arrangements could without difficulty be made for her representation by counsel. We find nothing to criticize in the practice of the Chancery Division on this point.

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[12] [1949] Ch. 320.

The Adoption of Children (County Court) Rules are differently framed. The material difference for the present purpose is that under rules 1 and 9 a parent is not only served with notice of the application but is made a respondent in the proceedings. By rule 27, "subject to these rules the County Court Rules shall "apply to proceedings under the Adoption of Children Acts, "1926 to 1949" (now the Act of 1950) "so far as they are "applicable." Order 5, rr. 13 and 14, of the County Court Rules contain provisions which require the appointment of a guardian ad litem, as to rule 13 where it appears on the face of the proceedings that a defendant is an infant, and as to rule 14 where it appears in the course of the proceedings that a defendant is an infant. Under Order 49, r. 2, "defendant" includes "respon-"dent." It is therefore difficult to resist the conclusion that under the Adoption of Children (County Court) Rules as they stand a guardian ad litem of an infant parent who is a respondent in adoption proceedings ought to be appointed upon its appearing on the face of or in the course of the proceedings that he or she is an infant. In the ordinary case where all that is necessary is that the judge should be satisfied of the parent's consent, and should where there is any doubt personally ascertain the real wishes of the parent in the matter, no useful purpose would be served by the appointment of a guardian ad litem, for the order will not be made unless the parent does consent. But in rare cases of the present kind, where an infant parent opposes, and an order is sought against that parent's will on the ground that his or her consent is unreasonably withheld, the question whether a guardian ad litem should be appointed or the High Court practice followed mutatis mutandis is one in regard to which the position should be made clear in the rules.

Appeal allowed.

Solicitors: *Miss M. A. Booth, Derby; Maddisons & Lambs, for Irving, Sitdown & Co., Derby; E. H. Nichols, Town Clerk, Derby.*

A. W. G.

C. A.

1952
Oct. 16, 17;
Nov. 3.

Evershed M.R., Denning and Romer L.JJ.

BIRCH *v.* WIGAN CORPORATION.

[Plaint No. H. 183.]

Housing—Closing order—Some houses in terrace unfit for habitation —Whether each house "part of a building" so that closing order permissible—Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *ss.* 11 *and* 12.

The plaintiff was the owner of six dwelling-houses which together formed one terrace block. The local authority purporting to act under the power conferred by section 12 of the Housing Act, 1936, served on the plaintiff a closing order in respect of three of the houses on the ground that they were unfit for human habitation and were not capable at reasonable expense of being rendered fit. The plaintiff appealed against the order. She admitted that the houses were unfit for habitation but contended that it accordingly followed that the local authority had no power to make any order other than a demolition order under section 11 of the Act of 1936. The local authority objected to making a demolition order since, if the three houses were demolished, the remaining three houses in the terrace which were fit for habitation would collapse. The authority contended that the whole terrace was a building and each dwelling-house was a part of that building and accordingly section 12 conferred power on them to make a closing order. The county court judge quashed the closing order:—

Held, (*per* Evershed M.R. and Romer L.J., Denning L.J. dissenting) that any building which was a "house" (as each of these three houses undoubtedly was) fell exclusively within section 11 of the Housing Act, 1936 and (if the conditions laid down in the section existed) the local authority was bound to apply the provisions of that section and make a demolition order. So far as sections 11 and 12 were concerned each dwelling was to be treated not as part of a building but as a house. The provisions of section 18 did not affect the construction of sections 11 and 12. The language of sections 11 and 12 did not support the suggestion that a dwelling in a terrace could be treated as a "house" within section 11 if it could be demolished without bringing the adjoining houses down but as "part of a building" if it could not be demolished without doing so.

Hedley v. *Webb* [1901] 2 Ch. 126 considered.

APPEAL from Judge Harold Brown sitting at Wigan county court.

The plaintiff, Mrs. Enid Ainsworth Birch, was the owner of a terrace block of six dwelling-houses numbered 239, 241, 243, 245, 247 and 249 Wigan Lane at Wigan. Each house was a self-contained unit, in that there was no internal means of communication between them. The houses were separated from each other by party walls. The terrace was built about 200 years ago. The defendants, the council of the county borough of Wigan, being satisfied that the houses Nos. 241, 247 and 249 Wigan Lane were unfit for human habitation and were not capable at reasonable expense of being rendered fit, by order dated April 9, 1952, which was expressed to be made under section 12 of the Housing Act, 1936, made a closing order in respect of these three houses.

The plaintiff appealed against that order. She did not dispute that the three houses in question were unfit for human habitation and could not be rendered fit at reasonable expense. She contended, however, that the council only had power to make a demolition order in respect of the houses under section 11 of the Housing Act, 1936,[1] and that they had no power to make a

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[1] Housing Act, 1936, s. 11 (1): "Where a local authority . . . are "satisfied that any house which is "occupied, or is of a type suitable "for occupation, by persons of the "working classes, is unfit for human "habitation and is not capable at a "reasonable expense of being rendered "so fit, they shall serve upon the "person having control of the house, "upon any other person who is an "owner thereof, . . . notice of the time ". . . and place at which the condi- "tion of the house and any offer with "respect to the carrying out of works, "or the future user of the house, "which he may wish to submit will "be considered by them, and every "person upon whom such a notice is "served shall be entitled to be heard "when the matter is so taken into "consideration. . . ."

Subs. (3): "The authority may if, "after consultation with any owner ". . . they think fit so to do, accept "an undertaking from him, either "that he will within a specified period "carry out such works as will in the "opinion of the authority render the "house fit for human habitation, or "that it shall not be used for human "habitation until the authority, on "being satisfied that it has been "rendered fit for that purpose, cancel "the undertaking."

Subs. (4): "If no such undertaking "as is mentioned in the last fore- "going subsection is accepted by the "authority, . . . the authority shall "forthwith make a demolition order "requiring that the house shall be "vacated within a period to be speci- "fied in the order, not being less than "twenty-eight days from the date on "which the order becomes operative. ". . ."

S. 12 (1): "A local authority may "under this Part of this Act take the "like proceedings in relation to any "part of a building which is occupied, "or is of a type suitable for occupation, "by persons of the working classes, "or in relation to any underground "room which is for the purposes of "this section to be deemed to be unfit "for human habitation, as they are "empowered to take in relation to "a house, subject, however, to this "qualification that, in circumstances "in which, in the case of a house, "they would have made a demolition "order, they shall make a closing "order prohibiting the use of the part "of the building or of the room, as "the case may be, for any purpose "other than a purpose approved by the "local authority, but (*a*) the approval "of the authority shall not be un- "reasonably withheld; and (*b*) the "authority shall determine the closing "order on being satisfied that the part "of the building or the room to which "it relates has been rendered fit for "human habitation. . . ."

S. 18: "A local authority may "pay to any person displaced from a "house, to which a demolition order "made under this Part of this Act, closing order under section 12 of that Act since section 12 was only applicable to "part of a building" and the dwelling-houses in question could not be so described. She would welcome a demolition order. The council did not want to make a demolition order in respect of the whole terrace owing to the local housing shortage, since the three remaining houses in the terrace were reasonably fit for habitation, and it was thought that, if the three houses which were unfit were demolished, the whole terrace would fall down because of the withdrawal of lateral support.

The county court judge held that the words in section 12, providing for the making of a closing order in respect of "any "part of a building," meant "any part of a building (such part "not being itself a house)." He allowed the plaintiff's appeal and quashed the closing order.

The council appealed.

H. S. L. Rigg for the council. The question to be decided is whether an entire dwelling-house can be treated as being part of a building for the purposes of section 12 of the Housing Act, 1936, so as to enable a local authority to make a closing order in respect of it. The court is asked to put a liberal interpretation on section 12. It is submitted that the terrace constitutes the building for the purpose of the section and each house in the terrace is part of that building. Section 11, under which demolition orders are made, is applicable to detached houses. Section 12 applies to parts of a building and gives an option to a local authority either to make a demolition order or a closing order. The county court judge was wrong in holding that a dwelling-house could not be a part of a building in respect of which a closing order can be made. Sections 11 and 12 are not mutually exclusive. A local authority can, in the case of a dwelling-house which is part of a building, go under whichever section it pleases. Section 18 of the Act of 1936 is only intelligible on the footing that the legislature contemplated that a closing order might be made in respect of a house.

The council's contention is that if a dwelling-house which is unfit for habitation is not part of a larger building a local authority must make a demolition order under section 11. If

"or a closing order applies, such "reasonable allowance as they think "fit towards his expenses in removing, "and to any person carrying on any "trade or business in any such house "they may pay also such reasonable "allowance as they think fit towards "the loss which, in their opinion, he "will sustain by reason of the disturbance of his trade or business "consequent on his having to quit the "house. . . ."

part of a building is unfit and it does not constitute a dwelling-house, then the local authority must make a closing order under section 12. If part of a building which is unfit is itself a dwelling-house then the local authority has an option to make a closing order or a demolition order. The meaning of "building" was considered by Fry L.J. in *Moir* v. *Williams*.[2] That decision shows that one building may contain several sets of chambers. In *Hedley* v. *Webb*[3] a pair of semi-detached houses were held to constitute one building. It is submitted that the county court judge was wrong in holding a closing order could not be made in respect of these three houses.

W. D. T. Hodgson for the plaintiff. The difficulties which arise in this case are exceptional. In an ordinary case the owner of a terrace would be prepared to give an undertaking under sub-clause (3) of section 11 not to use any house, which was found to be unfit, for human habitation. The meaning of section 12 appears from section 11, which makes the unit any house. Under that section the local authority is bound to make a demolition order. It is submitted that throughout Part II of the Act of 1936 the same meaning must be given to the word "house" and that "house" in section 12 has the same meaning as in section 11. Section 3 of the Housing Act, 1949, shows the mandatory nature of the provisions of section 11. Subsection (4) of section 11 imposes a duty to make a demolition order when the house cannot be rendered fit for habitation. Section 12 deals with a different subject matter to section 11. The sections are mutually exclusive; a house cannot be a house for the purposes of section 11 and part of a building for the purposes of section 12. The fact that a house is part of a building does not take it out of section 11. If the legislature had intended to give an option to make a closing order when a house was part of a building it would have done so in express terms. It is submitted that the language of these sections is clear and the county court judge reached a right conclusion.

Cur. adv. vult.

November 3. EVERSHED M.R. In my judgment the appeal in this matter should be dismissed for the reasons stated in the judgment which Romer L.J. will deliver, which I have had the advantage of seeing and to which I feel I can usefully add nothing.

[2] [1892] 1 Q.B. 264, 271.

[3] [1901] 2 Ch. 126.

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DENNING L.J., reading his judgment, said:—In a street in Wigan there is a block of six houses built about 200 years ago. Each house in the block is separated from the next one by a dividing wall or partition. All six are owned by the same owner, the plaintiff. Three of them are unfit for human habitation and cannot be made fit at any reasonable expense. The other three are still fit to live in. Two of the unfit houses are at one end of the block. The one other unfit house is in between two fit ones. The question is whether the three unfit houses should be demolished and pulled down, or whether they should only be closed and remain empty. The difficulty about demolishing the bad three is that it cannot be done without making the good three uninhabitable. Each house depends on the next for support. Even if the good three were shored up, their stability would be so impaired that they could not safely be occupied. That is an admitted fact.

In this situation the council say that the three unfit houses should not be demolished, but only closed and remain empty. They say that, by so doing, the three good houses will provide living quarters for three families which is very desirable in view of the housing shortage. So they have made an order not to demolish, but only to close the three unfit houses. On the other hand, the plaintiff, the owner of the six houses, says that all six should be demolished. She says that none of them are fit for human habitation and she would welcome a demolition order for the whole block, so that she could get the tenants out and build a new block altogether. Unless a demolition order is made, the statutory restrictions prevent her from evicting the tenants.

I think there is much to be said for the plaintiff's point of view. The closing of three of the houses can at best be only a temporary expedient. Once closed, they will rapidly fall into ruins, their bad condition will affect the others, and it cannot be long before the whole block will have to be demolished. So why not demolish them all now? This is, however, a question for the council, not for us. It depends very much on the housing situation in Wigan. The council are the people to decide it, not the courts. If the council do not choose to make a demolition order for all six houses, this court cannot compel them.

The owner now counters with a shrewd legal blow. She contends that the council have no power to make a closing order for the three bad houses. The judge has upheld this contention, and has quashed the closing order. He does not suggest that the council must make a demolition order for all six; but he does

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suggest—and this is what I wish to emphasize—that the council must make a demolition order for the three bad houses. According to the judge's reasoning, once the council are satisfied (as they are here) that three of the houses are fit and three unfit, there is only one course open to the council. They must then make a demolition order for the three unfit houses. They have no alternative. The statute, he says, is imperative on the point. The three unfit houses must be demolished, even though it makes the other three unsafe and uninhabitable.

I cannot believe that Parliament intended to enact anything so absurd, and I do not think they have. The question depends on the true interpretation of sections 11 and 12 of the Housing Act, 1936. Section 11 says that in the case of a " house " which is unfit the council must make a demolition order. Section 12 says that in the case of " part of a building " which is unfit they must make a closing order. Into which category do these three unfit houses fall? Is each of them a " house " within section 11, or is it a " part of a building " within section 12? At first sight one might be tempted to say that each house was both a " house " and also " part of a building." But the wording of the sections precludes such a solution. The sections are mutually exclusive. These three houses must be put in one category or the other. Each of them is either a " house " or a " part of a building." It cannot be both.

The solution of the problem is to be found, I think, by supposing that the six houses were all in different ownership, as, for instance, if each occupier owned his own house. If an order is made for the demolition of the three unfit houses, what is to happen to the owners of the three fit ones? They are clearly entitled at law to support from the neighbouring houses: see *Richards* v. *Rose*.[4] Can it be supposed that Parliament intended to take away their right of support without any protection for their houses and without any compensation for the damage done to them? Yet that is what it means if the judge is right. The Act contains no provision for the protection of the adjacent houses at all. It does not say that anyone is to do any shoring up, even if shoring up would be of any avail, or to treat the dividing wall or partition so as to make it weatherproof. It does not give the owners of the good houses any remedy if the demolition renders their houses damp or unsafe, and I do not see that they would have any remedy, at any rate not if the demolition was carried out with reasonable care. The statutory authority to demolish would be a bar to any action by the neighbouring owners. The absence of any provision for their protection leads me to the conclusion that Parliament did not contemplate that one house out of a block should be demolished any more than one flat out of a block of flats should be demolished.

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[4] (1853) 9 Ex. 218.

In this situation there is a simple solution which commends itself to me. It is this: When several houses are all in one block, separated from one another only by party walls—so that one cannot be pulled down without taking away the support of the other—they can properly be said to be part and parcel of one building. They then come within section 12 and not within section 11 at all. Each house in the block is "part of a building" within section 12. It is not a "house" within section 11. If some of the houses in the block are unfit and others are fit, the only proper order is a closing order against the unfit ones, not a demolition order. If all of the houses in the block are unfit, they still do not come within section 11. The proper procedure then is for them to be declared a clearance area within section 25 of the Act of 1936 and demolished under section 26. That is the procedure which was, in my own experience, often adopted before the war, and I think it is the right procedure.

This interpretation is supported by section 18 of the Act, which contemplates that a closing order can be made in respect of a house, and also by *Hedley* v. *Webb*,[5] where it was held that a pair of semi-detached houses constituted "one building only," whence it is right to say that each of them was part of a building.

The argument to the contrary, as I understand it, is this: According to the ordinary meaning of words, a house in a block is a "house" and not "part of a building." Even if this leads to absurdities, or even to injustice, so be it. It is the fault of Parliament. The courts wash their hands of it. I do not think we should approach an Act of Parliament in such a way. We should not thwart the intention of Parliament by holding them to the letter of what they have said. When there is a fair choice between a literal interpretation and a reasonable one—and there usually is—we should always choose the reasonable one. Such is, I believe, the true principle, and I do not find anything in the case of *Magor and St. Mellons Rural District Council* v. *Newport Corporation*[6] to throw doubt upon it.

I am therefore of opinion that the council were entitled to make a closing order for the three unfit houses, and I would allow the appeal.

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[5] [1901] 2 Ch. 126.

[6] [1952] A.C. 189.

ROMER L.J., after stating the facts, continued:—In my judgment, the order of the judge was right and I agree with the reasons on which it was founded. The respective contentions on each side may be shortly summarized as follows. For the council it was argued, as I understood it, that a demolition order ought only to be made under section 11 of the Act in relation to a house which does not form part of an entire block or building; that each house in a terrace (such as the one in the present case) forms part of one building, viz., the terrace itself; and that in regard to houses of that kind a local authority has the option of making a closing order under section 12 instead of a demolition order under section 11. On the other hand, it was argued on behalf of the plaintiff that sections 11 and 12 are mandatory and are mutually exclusive; that the former section deals with every building that constitutes a house and that the latter section is confined in its operation to parts of buildings other than houses.

There are four considerations which, at least in combination, seem to me to support very strongly the decision at which the judge arrived. First, it is quite clear that whether or not the three uninhabitable dwellings in question fall within section 12 of the Act, they come fair and square within the provisions of section 11. They are "houses" to which the conditions specified in section 11 admittedly attach. What, then, is the result? It is, on the clear language of section 11, that the local authority became bound—for the section is compelling in this regard—to set in motion the prescribed machinery for their demolition. In other words, section 11 on the face of it provides a comprehensive and compulsory code for the position which did in fact arise. Secondly, if, notwithstanding the precise applicability to the matter of section 11, the legislature intended to give the council the alternative of making a closing order under section 12, then an option is impliedly introduced which is inconsistent with the obligation imposed in unequivocal terms by section 11. The fact that no such words as "subject to the provisions of section 12" are to be found in section 11 suggests strongly to my mind that no such option was intended. Thirdly, just as the provisions of section 11 are mandatory when a position arises for their application, so also are those of section 12 in cases which fall within their scope. On the council's contention, the three houses under discussion fall within both of the sections and, in the absence of such an option as that which I have mentioned (and for which, in my judgment, there is no sufficient warrant), a local authority would be bound to make both a demolition order and a closing order in relation to them—a conception which tends with some force to show that sections 11 and 12 are mutually exclusive. Fourthly, inasmuch as the position of "houses" is fully and completely dealt with by section 11, the natural expectation surely is that the object of section 12 is to deal with something else. To my mind, that expectation is sufficiently fulfilled by the fact that in section 12 there is a most significant change in language. The word "house" disappears from the scene and a different word, the word "building," is used in its place—"any part of a building which is used or is suitable for use as a "dwelling." This in itself, I should have thought, sufficiently confirms the expectation that section 12 is dealing with something different from that with which section 11 has already dealt. If, however, any doubt on the matter still remained, it is, as I think, removed by the subsequent mention, for referential purposes only, of houses. The power conferred by section 11 is to order demolition and it is conferred in relation to "houses." Section 12 expressly enacts that in regard to a "part of a building" or "any underground room" which is unfit for habitation, the local authority may take the like proceedings as they are empowered to take "in relation to a house," but subject to the qualification that where "in the case of a house" they would have made a demolition order, they shall make a closing order instead. Whatever else, therefore, "any part of a building" may include, these references, in my judgment, establish conclusively that it does not include a house.

In view of the above considerations, I am of opinion that any building that is a "house" (as each of those in question before us undoubtedly is) falls exclusively within section 11 and the local authority is bound to apply to it (if the relevant conditions exist) the provisions of that section. No doubt for some purposes and in other contexts two "houses" may also constitute one building. The case of *Hedley* v. *Webb*[7] (cited to us) decided that two semi-detached houses were a single building for the purpose of determining whether there was a sewer within the meaning of section 4 of the Public Health Act, 1875. But the essential dichotomy with which we are concerned was absent from the section considered in that case and, so far as sections 11 and 12 of the Act now in question are concerned, each dwelling is to be treated not as a part of a building but as a house, a conception which, I venture to suggest, is in conformity with ordinary ideas on the subject.

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[7] [1901] 2 Ch. 126.

Some reliance was placed by Mr. Rigg on behalf of the council on section 18 of the Act of 1936, the language of which shows, in his submission, that the legislature envisaged the making of a closing order in relation to a house as a whole. It seems to me that this aspect of section 18 is quite insufficient to disturb the effect of the language in which sections 11 and 12 are couched. Moreover, it is to be observed that a closing order does in fact apply to a house, although it only affects a part of it.

Apart from the points with which I have already dealt, it was suggested by the council that the effect of sections 11 and 12 of the Act of 1936 might be that a dwelling in a terrace could be treated as a "house" if it could be demolished without bringing its neighbour to the ground, but as "part of a building" if it could not. This result, I think, can only be reached by taking remarkable liberties with the sections. Apart, however, from that, it would presumably also involve the gradual degradation of a dwelling which was a "house" when it was new to the status merely of a part of a building when it grew old. The precise point of time in its life when this humiliation would occur would in many cases give rise to controversy and uncertainty and I am quite unable to accept an argument which is unsupported by the language of the sections and which leads to such an extraordinary result.

Finally, it was urged that it would lead to the gravest inconvenience if a local authority could not make a closing order in relation to a derelict house, the demolition of which would bring about the destruction of adjoining houses which are fit to live in. To what extent this result will follow I do not know. It is common knowledge that during the recent war even old houses in terraces or rows of rather flimsy dwellings frequently survived the destruction of those which adjoined them, so possibly the fears which were expressed on this score may be somewhat overrated. Be that as it may, if sections 11 and 12 of the Act, on their true construction, require that a certain meaning and effect should be attributed to them, the fact (if fact it be) that one of the results may be unexpected and inconvenient is a matter for the legislature and not for the courts.

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For the above reasons, the appeal should, in my opinion, be dismissed.

Appeal dismissed.

Solicitors: *Ruston, Clark & Ruston, for Allan Royle, Town Clerk, Wigan; Gregory, Rowcliffe & Co., for Hall, Brydon & Co., Manchester.*

B. A. B.

C. A.

1952
Nov. 5.

Somervell,
Jenkins and
Hodson L.JJ.

ADLER *v.* BLACKMAN.

[1952 A. No. 848.]

Landlord and Tenant—Yearly or weekly tenancy—Agreement for one year's tenancy at weekly rent—Holding over on payment of same weekly rent—Notice to quit on basis of weekly tenancy—Rebuttal of presumption of yearly tenancy.

Where in a tenancy agreement for one year the rent is expressed to be so much per week, and the tenant holds over at the end of the term, only a weekly tenancy should be presumed.

Dictum of Maugham J. in *Ladies' Hosiery and Underwear Ld.* v. *Parker* [1930] 1 Ch. 304 applied.

Decision of Macnaghten J. in *Covered Markets Ld.* v. *Green* [1947] 2 All E.R. 140 overruled.

Decision of Ormerod J. [1952] W.N. 309 affirmed.

APPEAL from Ormerod J.[1]

Before 1948, the premises at 29 Cheshire Street, Bethnal Green, were let by the then landlord to the defendant Blackman on a weekly tenancy. On January 13, 1948, an agreement was entered into between the parties for a tenancy for 12 months, the rent being reserved in these terms: "To hold for the term of "one year to commence from December 22, 1947, at the inclusive "weekly rent of £3 payable weekly in advance on Monday in each "week during the whole of the tenancy. . . ." The defendant occupied the premises for the term provided in the agreement and thereafter remained in possession, paying the weekly rent reserved in the agreement.

The plaintiff, having purchased the property, on July 27, 1950, served a notice to quit on the defendant, on the basis that he held on a weekly tenancy. The defendant did not at that time question the validity of the notice and on August 2, 1950, he served a notice on the plaintiff under section 4 of the Landlord and Tenant Act, 1927, claiming compensation for loss of goodwill or, in lieu, a new lease of the premises under section 5 (1). The application was heard by a referee, who reported that a new lease should be granted to the defendant. The referee's opinion was overruled by the county court judge.

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[1] [1952] W.N. 309.

On March 19, 1950, the plaintiff issued a writ claiming possession, and in proceedings under Order 14 the defendant set up for the first time the contention that the notice to quit was invalid, being applicable only to the case of a weekly tenancy, whereas he was holding over on the terms of a yearly tenancy.

Ormerod J. held that the presumption that the defendant held as a yearly tenant had been rebutted, and that the notice to quit was therefore valid and had been accepted as such, without question, by the defendant.

The defendant appealed.

Heathcote-Williams Q.C. and *Hawser* for the defendant. It is submitted that the judge came to the wrong conclusion. In *Covered Markets Ld.* v. *Green*,[2] where the tenant was granted a lease for seven years at a rent payable weekly in advance, Macnaghten J. held that the proper inference to be drawn from the circumstances was that there was a yearly tenancy on the termination of the seven years. In his judgment in that case Macnaghten J. said: "I do not understand Maugham J. as "saying that where rent is payable weekly the proper inference "may not be that the tenant who held over is a tenant from "year to year." The defendant relies on those words. The effect of holding over is stated in Foa's Landlord and Tenant, 7th ed., para. 606, p. 388, thus: "Though the act of holding "over after the expiration of the term does not *necessarily* "create a tenancy of any kind—it being in such cases a question "of fact what the intention of the parties was—yet when a "tenant continues in possession after such expiration by consent "of the landlord, he is deemed prima facie a mere tenant at "will. In the case, however, of a letting *for a year* the implica- "tion from holding over by consent has been said to be 'a tacit "'renovation of the contract'—a dictum in the same decision "and later by the Court of Appeal in the enlarged sense of "implying a tenancy, not for another year, but from year to

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[2] [1947] 2 All E.R. 140.

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"year; and a similar 'renovation' would probably follow in the "case of letting for a single period, e.g., a quarter, month, or "week of the ordinary periodic tenancies." The cases therein referred to are *Right* v. *Darby*[3] and *Dougal* v. *McCarthy*.[4]

[SOMERVELL L.J. Maugham J. says there is no case in the books where this presumption of holding over has been applied except cases where the rent was expressed to be a rent by the year.]

There is no magic in the mode of payment of rent. In the Australian case of *Bank of Victoria* v. *M'Hutchison*[5] it was held that "if, after the expiration of a tenancy for a year certain at "a weekly rent, the tenant is allowed to remain in possession, "still paying a weekly rent, though at an increased rate, with-"out any other alteration in the terms of the holding, the "presumption is that the continuing tenancy is a yearly one." In *Box* v. *Attfield*[6] that decision was followed.

The essential fact is the length of the term. The old principle with regard to notices to quit is that an insufficient notice is bad for all purposes.

[SOMERVELL L.J. Subject to this, that if the tenant acts on the notice and goes out he cannot come back.]

I agree that the tenant has got to act at once or he will be out of time.

The judgment of Peterson J. in *Bebington* v. *Wildman*[7] shows that the notice to quit must be good when it is given and must not depend upon any subsequent notice or act.

Gallop Q.C. and *Avgherinos*, for the plaintiff, were not called upon to argue.

SOMERVELL L.J. This is an appeal from a decision of Ormerod J. It is a dispute between landlord and tenant. The question is whether a weekly notice to quit was a valid notice. The tenant entered into an agreement with his landlord, at one stage in their relationship, for a tenancy for one year of shop premises at a rent of three pounds a week. At the end of the year he remained in the shop and he continued to pay £3 per week. The notice to quit, as I have said, was on the basis that the tenancy was a weekly one. The tenant now seeks to say that this is wrong and to rely on the presumption—which is a rebuttable presumption—that in certain circumstances where there has been a yearly tenancy or a tenancy for a term and the tenant holds on and rent is accepted, it is a yearly tenancy. It is stated in this way in Hill and Redman, Landlord and Tenant, 11th ed., at p. 28: "A tenancy from year to year arises by pre-"sumption of law when a person who has entered upon premises, "or, having been a tenant, has remained in possession of premises "with the consent of the landlord in such circumstances as to be "in the first instance tenant at will or, in the case of holding over, "tenant at sufferance, subsequently pays rent with reference to "a yearly holding provided that there are no circumstances to "rebut the presumption."

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[3] (1786) 1 T.R. 159.

[4] [1893] 1 Q.B. 736.

[5] (1881) 7 Vict.L.R. 452.

[6] (1886) 12 Vict.L.R. 574.

[7] [1921] 1 Ch. 559.

At one time the tenant here was a tenant admittedly by the week. Then there was the agreement for a year, to which I have referred, and we are concerned with the period after that year had come to an end. It is on the agreement for the year that the tenant relies and it will be noted that the rent as expressed in the agreement was so much per week. The decided cases, when a yearly tenancy has been implied, are cases where the rent is stated as a rent per year, though, of course, such a rent may be payable half-yearly, quarterly, monthly, or, in one of the reported cases, weekly.

The first question is whether the fact that there is no yearly rent prevents the presumption applying or, rather, leads to the conclusion that it would not apply unless there might be some other circumstances on which it could be based. That point came before Maugham J. in *Ladies' Hosiery and Underwear Ld.* v. *Parker.*[8] That judge decided that case on another point, but as this matter had been argued he gave his views on it. The lease in that case was to let the premises for a term of three years commencing from October 12, 1914, at a weekly rent of £2, to be paid every week. The judge refers to the principle which I have stated, and to an old case where the principle was applied, where the rent was a yearly rent, 20 guineas a year, but it was to be paid weekly. Then he goes on to say[9]: "In the "present case, the lease or agreement is one for three years at a "rent of £2 a week. It is not a lease for three years at a rent "of £104 per annum payable weekly: and it is observable that "£2 a week is a rent which, as we all know, is not exactly "divisible into the number of days either of an ordinary year "or of a leap year. I cannot find, and counsel have been unable "to find, any case exactly in point; but I have come to the

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[8] [1930] 1 Ch. 304.

[9] Ibid. 328.

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"conclusion that there is no reason for extending the views, "which are binding on me, as to the terms which justify the "inference that a tenancy is from year to year, and that in this "case, narrow as the distinction is, the holding over of the "premises after the expiration of the agreement of October 10, "1914, would have resulted only, and did result only, in the "tenant's being a tenant from week to week."

I agree with that. I think that when, as here, a term comes to an end one has, of course, to consider what inferences are properly to be drawn from the payment and acceptance of rent. That is the basis of the presumption. In the cases in the books the rent is expressed to be so much per year and if one takes the extreme case in which the rent being so expressed is to be payable weekly, when the landlord accepts a weekly sum, what he is accepting is an instalment of the agreed figure for a yearly rent. One, therefore, sees from that the force of the line of argument which has led the courts in those cases to presume a tenancy for a further year. But in a case like the present, where the rent is expressed to be per week, I think when the fixed period has come to an end one should not presume anything but a weekly tenancy, namely, a tenancy for the period in respect of which the rent is expressed. It is one of those cases (and there are many) when the law has to do its best to fill up a gap which has been left by the parties. The parties are obviously in some relationship of landlord and tenant but they have not taken the trouble to write down in black and white what the relationship is. That, I think, is the proper conclusion.

There was a further point to which the trial judge referred, and though he did not regard it as necessary to his decision I will say a word about it. In July, 1950, this notice to quit was given on the basis that the tenant was a weekly tenant. On receipt of that notice the tenant then proceeded to apply under the Landlord and Tenant Act of 1927 for a new lease and compensation on the basis that that was a good notice bringing his tenancy to an end, whereas, of course, if it had been a yearly tenancy there would have been admittedly a six months' notice required expiring at the end of the year. The judge regarded that as evidence of the intention of the parties as at the time when the year terminated and, therefore, relevant to support the conclusion that the holding over was on the basis of a weekly tenancy. I find it unnecessary to rely on that though it would have been relevant in considering whether the presumption is rebutted if, contrary to the view I held, there had been a prima facie presumption that the tenant had held on a yearly tenancy. I do not, however, base my decision on what happened in July, 1950, and just afterwards, though it is perhaps comforting to realize that at any rate at that time neither side took the view that this was a yearly and not a weekly relationship. For these reasons I would dismiss the appeal.

JENKINS L.J. I agree. With the exceptions to which I will later refer, I think all the cases in which an implication of a yearly tenancy taking effect after the termination of a letting for one year, or a term of years, has been held to have been raised have been cases where the original letting, from which the implication was deduced, was a letting for a year or for a term of years at an annual rent, that is to say, a rent expressed as an annual sum, by whatever instalments it may have been made payable.

Maugham J., in *Ladies' Hosiery and Underwear Ld.* v. *Parker*,[10] held, in effect, that it was essential to the implication of a yearly tenancy after the determination of a letting for a year or for a term of years that the rent should be expressed as an annual sum. His view was that where the rent in the original letting was otherwise expressed (as in the case before him, where the original letting was for three years at a rent of £2 a week) there was no ground for the implication of a yearly tenancy. I agree with the reasoning of Maugham J., and I think his view is to be preferred to the view taken in the three cases which constitute the exceptions I have mentioned. Those cases were *Covered Markets Ld.* v. *Green*,[11] a decision of Macnaghten J., and two Australian cases to which we were referred, namely, *Bank of Victoria* v. *M'Hutchison*[12] and *Box* v. *Attfield*.[13]

As I have said, I think the reasoning of Lord Maugham in *Ladies' Hosiery and Underwear Ld.* v. *Parker*[14] is to be preferred, and it follows, in my view, that the trial judge's decision in the present case is warranted by the form of the letting for one year, which was a letting "for a term of one year to com-"mence from December 22, 1947, at the inclusive weekly rent "of £3 payable weekly in advance on Monday in each week "during the whole of the tenancy, the first four weeks to be "paid on the signing hereof," the rent being thus expressed to be payable simply as a weekly rent and not as an instalment of the rent fixed for the one year's tenancy. At highest I think the position so far as it rests on the tenancy agreement alone is equivocal, and if it is equivocal then it seems to me that any doubt as to the parties' intention is resolved in favour of the landlord by the facts that the notice to quit of July 7, 1950, expressly describes the tenancy as a weekly tenancy, and that this view of the position was accepted by the tenant who, thereupon, made his application under the Landlord and Tenant Act, 1927, on the footing that he held the premises on a weekly tenancy at £3 per week payable on Mondays.

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[10] [1930] 1 Ch. 304.

[11] [1942] 2 All E.R. 140.

[12] 7 Vict.L.R. 452.

[13] 12 Vict.L.R. 574.

[14] [1930] 1 Ch. 304.

It is no doubt true that the subsequent expression by the parties of erroneous views as to the terms of a bargain previously entered into cannot alter its legal effect; but what one is seeking here is the intention to be imputed to the parties from the facts that the tenant has remained in occupation with the consent of the landlord and has paid rent, after the expiration of the term of the original letting. As I have said, I think at highest in favour of the tenant the implication here, so far as it is based simply on those bare facts, is equivocal owing to the absence of any reservation of rent expressed as an annual sum. It follows, in my view, that other evidence may be resorted to for the purpose of ascertaining what their true intention was. Here one has a record of their understanding of the position in July and August, 1950, which seems to me to provide at all events some evidence of what their intention must be taken to have been at the time when the letting for a year at a weekly rent came to an end and the tenant held over. Accordingly, I agree that this appeal should be dismissed.

HODSON L.J. I agree that the observations of Maugham J. in *Ladies' Hosiery and Underwear Ld.* v. *Parker*[15] apply exactly mutatis mutandis to this case, and I agree with that judge's view of an agreement which corresponded very closely to the agreement now under consideration. That disposes of this case, and I think it does involve a rejection of the view which Macnaghten J. took in *Covered Market* v. *Green*,[16] a case in which the agreement was virtually indistinguishable. It is, therefore, unnecessary to consider what the effect may be or might have been of the subsequent conduct of the parties after

[15] [1930] 1 Ch. 304.

[16] [1947] 2 All E.R. 141.

the date of the expiration of the agreement. I agree, therefore, that the appeal should be dismissed.

SOMERVELL L.J. I would like to add that I agree with what my brethren have said about the *Covered Market* case.[16]

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *Manches & Co.; Adler & Adler.*

A. W. G.

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[16] [1947] 2 All E.R. 141.

SEXTON *v.* SCAFFOLDING (GREAT BRITAIN) LD.

[1951 S. No. 2260.]

C. A.
1952
Nov. 25, 26.

Somervell, Jenkins and Hodson L.JJ.

Building — Scaffolding — Dismantling — Building operation — Working place from which a person is liable to fall more than 6 *ft.* 6 *in.— Guard-rail—Removal during dismantling of scaffold—Breach of statutory duty—Building (Safety, Health and Welfare) Regulations,* 1948 (*S.I.* 1948, *No.* 1145), *regs.* 2, 4, 24 (1).

By reg. 24 of the Building (Safety, Health and Welfare) Regulations, 1948, "every side of a working platform or working place, "being a side thereof from which a person is liable to fall more "than 6 feet 6 inches, shall be provided with a suitable guard-rail or "guard-rails."

When the building operations had finished and the lowest lift or level of the tubular scaffolding used in those operations was about to be dismantled the defendants' charge-hand ordered the removal of a guard-rail which had been erected for the protection of men working on a ledge some 20 feet from the ground on which the scaffolding was based, and which was formed by the upper floors of the premises being set back some feet from the building line of the ground floor. The plaintiff workman, while walking along the ledge, outside the scaffold uprights, fell to the ground and sustained injury. He claimed damages from the defendants for breach of statutory duty:—

Held, that although "scaffolding" came within the Building (Safety, Health and Welfare) Regulations, 1948, reg. 24, which required the provision of a safety device, which itself formed part of the scaffolding, applied only to a scaffolding in use and could have no application where the work in question was the actual dismantling of the scaffolding itself, including any guard-rail there might be upon it. The defendant employers were therefore not in breach of statutory duty.

Decision of Donovan J. [1952] W.N. 549 reversed.

C. A.
1952

Sexton
v.
Scaffolding
(Great
Britain) Ld.

Appeal from Donovan J.[1]

The plaintiff, Terence Sexton, was employed by the defendant firm as a scaffolder in the operation of dismantling tubular scaffolding erected at the face of a building and based upon a ledge forming the roof of a shop. The living-rooms above the shop were set back some five feet from the building line of the shop, but where a bay window of a living-room projected the width of the ledge was reduced to about 2 feet 1 inch. The ledge was about 20 feet from the ground and to a workman passing along the coping stone of the ledge, outside the uprights of the scaffolding, only five inches of foothold was available. When the scaffolding was erected a hand-rail, consisting of a scaffold tube fixed to the flanks of the scaffold, about three feet above the coping stone, had been provided as a protection for persons working on the scaffolding. After all but the last lift of the scaffolding had been dismantled, one of the scaffolders, on the orders of the charge-hand, removed the hand-rail. Shortly afterwards the plaintiff, when walking along the coping stone on the outside of the scaffold poles, lost his foothold, fell to the ground, and sustained injury.

The plaintiff claimed damages, alleging negligence at common law and breach by the defendants of their statutory duty under reg. 24 (1) of the Building (Safety, Health and Welfare) Regulations, 1948,[2] to provide a guard-rail. The defendants denied negligence and contended that the Building Regulations were not applicable to the work of dismantling the scaffolding. They also alleged that the accident was caused or contributed to by the negligence of the plaintiff.

The trial judge held that the dismantling of the scaffolding was an operation on a building and the scaffolding was "plant "used in such operations" within reg. 2 (1) of the Building Regulations,[2] and therefore under reg. 24 (1) the defendants were in breach of their statutory duty to provide a guard-rail at the time of the accident. He further held that the plaintiff had been guilty of contributory negligence and only awarded him two-thirds of the damages, which he assessed at £2,128 11s.

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[1] [1952] W.N. 549.

[2] Building (Safety, Health and Welfare) Regulations, 1948, reg. 2 (1): "These regulations shall apply to "the following operations . . . the "construction, structural alteration, "repair or maintenance of a building ". . . the demolition of a building ". . . and to machinery or plant used "in such operations. . . ."

Reg. 4: ". . . it shall be the duty "of every contractor or employer of "workmen who erects or alters any "scaffold to comply with such of the "requirements of regs. 5–30 as relate "to the erection or alteration of "scaffolds having regard to the "purpose or purposes for which the "scaffold is designed at the time of "erection or alteration. . . ."

Reg. 24 (1): ". . . every side of a "working platform or working place, "being a side thereof from which a "person is liable to fall more than "6 feet 6 inches, shall be provided "with a suitable guard-rail or guard-"rails . . . to a height of at least "3 feet above the platform or place."

The defendants appealed.

Stephen Chapman for the defendants. The judge has held that the erection and dismantling of scaffolding is itself a building operation within the meaning of reg. 2 of the Building Regulations, and that therefore there is a statutory duty under reg. 24 to provide a suitable guard-rail for the protection of workmen. It is desired to challenge that finding, which, if it be upheld, will practically render it impossible to carry on the business of scaffolding. To hold that when the building work is finished, and the scaffolding is being dismantled, there continues to be a statutory duty on the scaffolder to comply with the building regulations is a very drastic finding. It is submitted that the Building Regulations are not intended to apply to scaffolding at all, or at any rate when the building operations have finished and the scaffolding is being dismantled. Basically these regulations are dealing with the safety of people engaged in building work and not with people engaged in erecting scaffolding.

[SOMERVELL L.J. Surely the building operations are not over until the scaffolding has been taken down.]

Once the operations under reg. 2 have finished the Building Regulations cease to apply to scaffolding. It is only in so far as the building operations are continuing, and the user of the plant takes place, that the regulations apply. The dismantling of the scaffolding is an entirely separate job and not within the regulations, which are intended for the protection of building operatives and not of the scaffolders, who have their ordinary common law rights. During the course of the building operations the scaffolding contractor becomes liable if he fails to provide for the safety of his workmen, but before the start and after the finish of the building operations he is outside the regulations and under no liability.

Anthony Marlowe Q.C. and *H. T. Buckee* for the plaintiff. These regulations must have some application to scaffolding, otherwise the men who do the most dangerous part of the work towards building would be entirely without protection.

[SOMERVELL L.J. We need not trouble you on Mr. Chapman's broad proposition that none of these regulations apply to the scaffolder's men, the scaffolder being an independent contractor.

We think that some of these regulations are by their terms inapplicable to scaffolding, and the question we have to decide is whether the regulation which applies to guard-rails is inapplicable to men engaged in demolishing or erecting scaffolding.]

The place where the accident occurred was a place where the plaintiff and his fellow workmen had still to do work in removing the last lift, which stood some six feet above their heads. They were conscious of being protected by a guard-rail, and if the rail had not been removed the reasonable deduction was that this accident would not have happened. The judge has found that it was unnecessary, to the point of folly, to remove the guard-rail so soon, and there is evidence on which he could so find. It would be a normal precaution to ensure that the protection of the guard-rail was retained until the overhead work had been completed, and the charge-hand ought not to have permitted its removal. Although, no doubt, the defendants desire a ruling on their position under the Building Regulations, this is not the best case to test it. Clearly the regulations are intended to apply to scaffolding: see reg. 2. It is conceded that a scaffold is " a plant " used in building operations, and building operations begin when the scaffolding is started and finish when the scaffolding is taken away. If by reg. 4 it is intended to protect the scaffolder's men during the erection or alteration of the scaffolding, it must have been intended to protect them during the dismantling. Reg. 24 applies to scaffolding up to the point when it ceases to be scaffolding, and the judge has rightly held that it was unreasonable and folly to remove the guard-rail when it was removed.

Chapman was not called upon to reply.

SOMERVELL L.J., having stated the facts and read reg. 24 of the Building Regulations, continued:—Mr. Chapman's first point was that these regulations, on their true construction, did not apply to men employed by a scaffolder at all; they were for the protection of the men engaged on building as distinct from scaffolders. I do not accept that submission and I see nothing in the regulations to support it. I will briefly set out the general structure of the regulations as it appears to me. Under reg. 2 they are to apply to operations which include the construction, structural alteration, repair or maintenance of a building. I will take as an example the present case, namely, the operation of repair or maintenance of a building. Pausing there, I would have thought myself that, on the natural meaning of those words, any scaffolding which it was necessary to erect in order to do the repair or maintenance was part of the operation of repair or maintenance. It may not in the result, as I see the problem in this case matter, because the regulation goes on to say that the regulations apply to plant used in such operation, and if there is any difficulty about the view which I have just indicated, then clearly scaffolding would be regarded as plant. When one comes to reg. 4, that says that: "It shall be the duty of every contractor "and employer of workmen who is undertaking any of the opera-"tions to which these regulations apply (i) to comply with such "of the requirements of regulations," and then a considerable number are set out, including No. 24, "as affect any workmen "employed by him." Reg. 4 then says: "It shall be the duty "of every contractor and employer of workmen who is under-"taking any of the operations to which these regulations apply "... (ii) to comply with," and then another lot of regulations are set out, and the duty there is limited in this way: "as relate "to any work, act or operation performed or about to be performed "by such contractor or employer of workmen." Then it goes on: "and it shall be the duty of every contractor and employer "of workmen who erects or alters any scaffold to comply with "such of the requirements of regulations 5–30 as relate to the "erection or alteration of scaffolds having regard to the purpose "or purposes for which the scaffold is designed at the time of "erection or alteration."

In the view I take it is unnecessary to express any final and concluded opinion as to how reg. 4 (i) quoad scaffolding fits in with the words which follow, but I will indicate my own view. First of all, if you take what must be fairly common now, and what was in the old days the ordinary case, of a builder who puts up his own scaffolding for repair, maintenance, or whatever it may be, I would have thought he was within 4 (i). On the view that the operation of repair and maintenance includes scaffolding, then I think an independent scaffolding contractor would prima facie be within 4 (i), but I incline to think that although that would be the prima facie view, an independent scaffolding contractor is dealt with expressly as a special class by the later words, and the purpose of taking him out, as it were, of the general class, and dealing with him specially, is for the purpose of limiting his liability to the regulations there set out and having regard to the purpose or purposes for which the scaffolding is designed at the time of erection or alteration.

There seems to be nothing in either of those two sections, and nothing in the specific regulations which follow, to support the proposition that none of those regulations were intended for the protection of men employed by what I will call an independent scaffolding contractor. On the other hand, it is to my mind clear that some of the regulations quite plainly, owing to their language, are inapplicable to the process of erecting at the initial stage and dismantling at the final stage scaffolding which is necessary for the building work in question. For example, the regulation which deals with the proper maintenance of scaffolding provides that every part shall be fixed, secured or placed in position, and that is, of course, inapplicable to the process of erecting the scaffolding and in fact fixing those parts in position. There was a regulation that no scaffold shall be used unless it has been inspected by a competent person within the preceding seven days. That is a regulation which would only come into operation when the scaffolding, or perhaps some new lift of the scaffolding, had been completed. It would not apply when it was in course of construction.

On the other hand, I can see no reason why some of these regulations are not to be construed as for the protection of the scaffolders' men as much as builders' men. I will give one example of that. There is reg. 11, dealing with ladders as uprights of scaffolds. They are to be of adequate strength. Suppose such ladders were at the base of the scaffolding structure and were necessary for the scaffold men to use in getting up to some higher stage where they had to work, it would seem to me that this regulation was for their protection just as much as for the protection of any other employee, who had to use those ladders in order to reach the place where he was working. As it seems to me, therefore, the problem in the present case is whether, having regard to its wording and its purpose, to be gathered from its terms, reg. 24 was applicable to the work which was being done at the time.

The evidence called for the defendants was that when you get to the dismantling of a particular lift the normal practice is to remove the guard-rail first. The judge found that that was not always done as the first stage, though it often was. I would say myself that the weight of the evidence was strongly in favour of the view that that was the usual practice.

The reason why it is normally removed at first, or at any rate at an early stage, is because the area, as here, between the uprights of the scaffold and the wall is not usually very big and, while there may be plenty of room, as was said here, for a man to stand with his back against the rail, say to paint, once the men begin to take down the lengths of tubing and move them along they want the maximum room in which to manoeuvre. In the present case it was the labourer, Mr. Rocks, who asked the charge-hand to have the guard-rail removed, because he found it in his way and inconvenient having regard to the boards and the other objects which he had to handle and move. One also, I think, has to bear in mind that a great deal of the work done by these scaffolders is, of course, as the witnesses said, work which they do at heights with no guard-rail to guard them. The judge, on this part of the case, if I may say so, quite rightly had in mind the fact that obviously there cannot be a guard-rail to guard the men who ultimately have to remove it and there would be work to be done after it has been removed. The uprights to which it is attached will have to be taken down, as in the present case, and the various pieces of scaffolding would have to be brought to the ground. But while admitting that, he took the view that the regulation applied so that, when you are dealing with either the construction or demolition of a lift such as this, the guard-rail must be put up as soon as it is physically possible and taken down at the last moment, when physically it has to be taken down.

I have come to the conclusion (and I am not suggesting that the question is an easy one) that this reg. 24 does not apply to this operation, which I think has to be regarded as a single operation, in which the taking down of the guard-rail is an essential part, which has to be done at some time or another. I do not think when one is dealing with a single operation which involves either the erection or the taking down of the safety device which is provided for, one can read into the regulations words which say that that must be done at the first or the last moment which is physically possible. I am dealing here with the facts of this case and with this operation which was being done at the time. I am not saying that because a scaffolding of six or eight lifts was being demolished that therefore as soon as any work was done on the top lift the guard-rails should be taken out of all the other lifts through which, possibly, the men had to pass to get up to the top. That can be dealt with when it arises. I am dealing with this case and what I have described as the single operation of dismantling this lift. That being so, I have come to the conclusion that there was no breach of the statutory regulations.

[His Lordship then turned to the question whether there was negligence at common law and said:] The judge found that the danger of removing the hand-rail prematurely was so obvious as to make it folly to do so. With respect, doing the best I can, I cannot accept that, having regard to the findings to which I have referred. I do not think the plaintiff has established a case of breach of duty at common law and I would therefore allow the appeal.

Jenkins L.J. stated the facts, and continued:—The claim was made on two grounds; the first being breach of statutory duty under reg. 24 of the Building Regulations, 1948, and the second negligence at common law. The judge found the alleged breach of statutory duty proved, and found also, if he was wrong as regards that ground, that the defendants had been negligent at common law, though he held that the plaintiff had also been negligent and assessed his contributory negligence at one-third of the liability. Reg. 24, to which my Lord has already referred, provides, by para. (1), that, subject to certain other paragraphs of which I only propose to refer to para. (3): "Every "side of a working platform or working place, being a side "thereof from which a person is liable to fall a distance of more "than 6 feet 6 inches, shall be provided with a suitable guard-"rail or guard-rails of adequate strength," with further particulars about the dimensions of the guard-rail. Para. 3 says: "Guard-rails and toe-boards required by paras. (1) and (2) of this "regulation may be removed or remain unerected for the time "and to the extent necessary for the access of persons or the "movement of materials." The plaintiff's case as regards statutory duty was that the space at first floor level on the premises in question from which point upwards the scaffolding had been erected was a working place, and that as it was more than 6 feet 6 inches from the ground, being in fact a matter of, I think, about 15 feet from the ground, the defendants were obliged under reg. 24 to provide a suitable guard-rail or guard-rails. In fact, at the time when the accident took place, the dismantling of the scaffolding had reached a point at which the guard-rail had been removed.

The first question in the appeal is whether the Building Regulations apply to the particular operation which was going on at the time of the accident, that is to say, the dismantling of scaffolding. The defendants were only concerned in the work done on the premises as the providers of the necessary scaffolding, they being specialists in that matter, and their business consisting of contracting to provide the scaffolding required for building operations carried out by other people. This scaffolding having served its purpose and the work having been completed, nothing remained to be done except to dismantle it. As to the application of the Building Regulations in general, it is unnecessary for the purposes of this case to decide—and I am not prepared to hold—that none of those regulations in any circumstances applies to persons employed in the erection or dismantling of scaffolding, but it does not follow that all of the regulations necessarily do so.

The scope of the regulations is defined in reg. 2, and " scaffold " is defined in reg. 3. Speaking for myself, I am inclined to think that the erection or dismantling of scaffolding is not in itself an " operation to which these regulations apply." I think that is borne out by the definition of " scaffold." But plainly the erection of scaffolding is a necessary incident to probably most of the operations to which the regulations do expressly apply and it is recognized as such throughout the regulations, which make a considerable number of special provisions in regard to scaffolding. It is also, I think, " plant," according to the natural meaning of that word as used in reg. 2 (1).

I should also refer to reg. 4, which says: " It shall be the " duty of every contractor and employer of workmen who is " undertaking any of the operations to which these regulations " apply (i) to comply with such of the requirements " of a large number of regulations, including in particular regs. 5 to 30, " as affects any workman employed by him." By subpara. (ii) persons similarly described have to comply with a further number of regulations so far as they " relate to any work, act or opera- " tion performed or about to be performed by such contractor or " employer of workmen." Then there is this provision: " and " it shall be the duty of every contractor and employer of work- " men who erects or alters any scaffold to comply with such of " the requirements of regs. 5–30 as relate to the erection or " alteration of scaffolds having regard to the purpose or purposes " for which the scaffold is designed at the time of erection or " alteration."

As to that regulation, I am inclined to think, as I understand my Lord to do, that it refers to two classes of persons, the first being contractors and employers of workmen who are undertaking operations to which the Act applies, that is to say, undertaking actual building, repairing or maintenance operations of some sort within the range of operations described in reg. 2. They have to comply with the regulations mentioned for the benefit of their own employees and the regulations with which they have to comply are, amongst others, regs. 5 to 30, which are regulations dealing with scaffolding. Whatever steps those persons take to provide the scaffolding necessary for the carrying out of the building operations on which they are engaged, whether they provide the scaffolding themselves or procure a specialist contractor such as the defendants in this case to supply it, it is their responsibility to see that the scaffolding, for so long as it is used by their employees, conforms with all the requirements of regs. 5 to 30. They also have to comply with the other regulations mentioned in subpara. (ii).

Then a second class of persons is introduced by the words " and it shall be the duty of every contractor and employer of " workmen who erects or alters any scaffold to comply with such " of the requirements of regs. 5–30 as relate to the erection or " alteration of scaffolds having regard to the purpose or purposes " for which the scaffold is designed at the time of erection or " alteration." That provision appearing, as it does, immediately after the reference to " every contractor and employer of work- " men " who is undertaking any of the operations to which the regulations apply, and to the duties imposed on those persons, seems to me to point to the case of contractors in the position of the defendants who are providing scaffolding to be used in building operations by the employees of others. The duty primarily laid upon them is to conform to regs. 5 to 30 as regards the method of construction, design and so forth of the scaffolding that they provide. They cannot excuse themselves from liability because the persons who actually use the scaffolding will be or may be people in the employment of some other contractor or employer of workmen.

I repeat that it is unnecessary, for the purposes of this case, to go further than to consider whether reg. 24 applied to the particular operation of dismantling scaffolding in the course of which the accident took place. It is unnecessary to decide and, as I have said, I am not prepared to hold, that none of these regulations in any circumstances is applicable to a person employed in erecting or dismantling a scaffold. It seems to me that these regulations are broadly, I think one might say, of two kinds. There is one kind which deals with such matters as the suitability, strength, condition and mode of securing the components of the scaffolding, and another kind which relates to the safety devices and protective features to be included in the scaffolding when complete and ready for use. It seems to me that regulations of the first type might well apply to a man engaged in erecting or in dismantling scaffolding. The example given by my Lord was that of a defective ladder, which might break under a scaffolding erector while he was climbing the scaffolding in the course of erecting or dismantling it.

On the other hand, regulations of the other sort, those relating to the safety devices and protective features which the completed scaffolding is to include, seem to me to be appropriate only to the completed scaffolding, and to relate to features which, as a complete scaffolding, it must possess while it is being used by the persons for whose use it has been provided. In particular, the guard-rails required by reg. 24 are part of the complete scaffold. They are recognized as being part of the scaffolding by the definition of scaffold to which I have referred. It seems to me reasonably plain that a regulation requiring a feature such as that, which itself forms a part of the scaffolding, can have no application where the work in question is the actual dismantling of the scaffolding itself, including any guard-rail or guard-rails there may be upon it. If that were not so, so far as I can see it would be impossible ever to dismantle any scaffolding without committing breaches of these regulations and therefore being guilty of criminal offences.

I think the regulations themselves, apart from the impossibility of applying them in their entirety to the dismantling of scaffolding, show that dismantling is an operation of a special kind. I would refer to reg. 6, which says: " No scaffold shall be " erected or be substantially added to or altered or be dismantled " except under the immediate supervision of a competent person " and so far as possible by competent workmen possessing " adequate experience of such work. All material for any " scaffold shall be inspected by a competent person on each " occasion before being taken into use." That suggests to my mind that the regulations are intended to leave the operation of dismantling scaffolding and the order in which the different parts of the scaffolding are to be taken down, to the judgment of the people in charge of the work, and that reg. 6 provides that the work is to be done under the immediate supervision of a competent person, and so far as possible by competent workmen with adequate experience of such work, as the best method of ensuring the safe execution of an operation for which no hard and fast rule can be laid down as to the precise order in which the component parts of the scaffolding are to be removed.

There is another reference to dismantling in reg. 9, which contemplates a partly dismantled scaffold and is concerned, in cases where a partly dismantled scaffold does not comply with the regulations, to prevent people from using the scaffold. If one was to construe these regulations as applying in their entirety and without exception to the work of dismantling a scaffold, it would be difficult to resist the conclusion that the contractor or employer of workmen responsible for the original or any further dismantling in such cases as are envisaged by para. (2) (*b*) of reg. 9 would be in breach of the regulations. That seems to me to add further support for my conclusion that dismantling is regarded by these regulations as an operation of a special character.

It is said that reg. 24 is capable of being sensibly applied to scaffolding in the course of dismantling, and the judge seems to have held that the way to give it a sensible application is to regard it as meaning that, while at some stage in the dismantling operation the guard-rail must necessarily be removed, it is not to be removed at an earlier stage in the dismantling operation than is necessary. I think the judge founded himself to some extent on subpara. (3), which allows guard-rails to be "removed "or remain unerected for the time and to the extent necessary "for the access of persons or the movement of materials." I do not myself think that that subparagraph throws any light on the matter. The removal of the guard-rails permanently as a step in the course of dismantling cannot, in my view, be fairly regarded, according to the ordinary use of language, as a removal of the guard-rails "for the time and to the extent necessary for . . . the "movement of materials." I think subpara. (3) is directed to access of persons or movement of materials in the course of the building operations and not in the course of taking down the scaffolding itself, including the guard-rail.

Therefore, I cannot regard subpara. (3) as throwing any light on the matter and, apart from that subparagraph, I see no justification for qualifying reg. 24 in the way the judge has done. The obligation is an absolute obligation and either it must apply or it must not. If it cannot apply in its unqualified form, it cannot in my view apply at all, and it does not seem to me that it is right for the court to say that although this statutory obligation cannot be complied with to its full extent and in its full rigour to dismantling operations, nevertheless the court will apply it to such extent as appears to the court on the evidence to be necessary. In my view, that is not the right way to treat a regulation of this kind. As I have said, I cannot see how this regulation can be applied to the operation of dismantling, because it seems to me inevitable that at some time in the course of dismantling, any guard-rail, being itself part of the scaffolding, must be taken down and removed, and there must be people on the scaffolding after the guard-rail has been removed. Otherwise the operation of dismantling could not, as far as I can see, be carried out at all. As to the precise point of time at which the guard-rail should be taken down, in my view that cannot, in the absence of any express provision, be regarded as a matter of statutory regulation. It is a matter which must be left to the good sense and practical experience of the person in charge of the operation. Accordingly, for substantially the same reasons as my Lord has given, I agree in thinking that the alleged breach of statutory duty in this case was not made out.

As to the claim in negligence at common law, I have very little to add. What was done about the guard-rail was in accordance with usual practice, and after the guard-rail was removed it was possible for the plaintiff to walk in the trough with safety. In those circumstances, it does not seem to me that the charge of negligence at common law is made out. The plaintiff was not exposed to any unreasonable risk. He was left with a safe place to walk, he being an experienced scaffolder. Accordingly, I think the alternative ground of claim fails also and I would allow the appeal.

HODSON L.J. I also agree. On the question whether the regulations apply, I agree with my Lords and with the trial judge in rejecting the submission made by Mr. Chapman that they had no application to the scaffolders in this case. The way in which the matter was put was that the operations covered by the regulations were building operations and the erection of scaffolding and the dismantling of scaffolding before and after the building operations were outside its scope. The judge said: "The defendants contend that the scaffold is not a building "within the meaning of the regulations. But the regulations "apply to specified *operations* being operations on a building, "and the erection and dismantling of any necessary scaffold "would certainly be part of such operations. I should also have "thought that scaffolding was covered by the words 'plant used

" 'in such operations.' If scaffolds were not within the regulations at all, then regs. 5 to 21 containing a number of directions "to ensure that scaffolds are safe are either meaningless, or are "to be construed in such a way as to exclude scaffolders from "their protection." I see no reason to dissent from that passage. It may be open to question whether scaffolding comes under the heading of construction, repair or maintenance of a building or whether it comes only under the heading of "plant "used in such operations," but in any event I think the result is the same. Treating the matter generally, I would agree that prima facie the regulations apply.

Having come to that conclusion, the judge took the further step of saying that, if that was so, reg. 24, which is the regulation in question here and has to do with the provision of guard-rails, must be applied to the work on which the plaintiff was employed when he was injured. Realizing the difficulty, since the scaffolding was being dismantled, that there must come a point when the provision of guard-rails would be impossible, he drew the line at that point and in effect held that the regulation applied until the time came when the contractor had to take down the safeguard which the regulation provides for. For myself, I do not think it is legitimate or possible to draw the line at that point. If it were right to draw the line there, it would, I suppose, be fair to argue in connexion with reg. 5, which has to do with the provision of scaffolds, there must always be a scaffold erected to support any scaffold which was already there because it is physically possible to do so.

I think the question really is whether the regulation as a whole applies or not. The conclusion to which I have come with regard to reg. 24 is the same as that at which my Lords have arrived, namely, that it does not apply. Reg. 24 has to do with what I think I might describe as a scaffold in use. A scaffold in use has to have any working platform from which a person is liable to fall a distance of more than 6 feet 6 inches "provided with a suitable guard-rail or guard-rails of adequate "strength." The process of dismantling scaffolds is not, in my view, within the purview of that regulation. Dismantling is mentioned in regs. 6 and 9, reg. 6 being the important regulation which provides that "no scaffold shall be erected or be substantially added to or altered or be dismantled except under "the immediate supervision of a competent person and so far as "possible by competent workmen possessing adequate experience "of such work." I respectfully disagree with the judge's conclusion that there was any breach of the regulations.

[His Lordship then considered the evidence and came to the conclusion that there was no evidence on which it could be held that the defendants were in breach of their common law duty to take reasonable care for the safety of their employees. He agreed that the appeal should be allowed.]

Appeal allowed.

Solicitors: *L. Bingham & Co.; Berry Tompkins & Co.*

A. W. G.

MARSHALL *v.* GOTHAM CO. LD.

[1951 M. 1041.]

C. A.
1952
Nov. 7, 10, 21.

Somervell, Jenkins and Hodson L.JJ.

Mines and Minerals—Gypsum mine—Fall of marl from roof—Caused by slickenside—Fatal accident to workman—Statutory duty of mine-owners "to make secure the roof and sides of every . . . "working place" so far as shall be reasonably practicable—System of tapping—Whether props necessary—Metalliferous Mines Regulation Act, 1872 (35 *&* 36 *Vict. c.* 77), *s.* 23*—Metalliferous Mines General Regulations,* 1938 (*S.R. & O. No.* 630), *para.* 7 (3).

The Metalliferous Mines General Regulations, 1938, substituted for the General Rules originally set out in section 23 of the Metalliferous Mines Regulation Act, 1872, must be read in conjunction with and as qualified by the prefatory provision contained in that section: and accordingly the duty imposed by article 7 (3) of the Regulations, which requires that "the roof and sides of every "travelling road, outlet and working place shall be made secure" is fulfilled if everything has been done which it was reasonably practicable to do to make them secure.

An employee of the defendants while working in their gypsum mine was killed by a fall of roof. Before the work began the defendants had, according to their normal system, inspected the roof for visible faults, tapped it with a hammer and brought down all unsound portions of the roof which had been detected. The uniform experience of many years' working of the mine had proved that this system was effective to make the roof secure. The fall was due to the presence in the roof of an unusual geological condition known as "slickenside," which no one expected or had any reason to expect, for it had never previously been encountered in the mine. In an action brought by the widow of the workman against the defendants claiming damages for breach of statutory duty, the trial judge found that it was possible for the defendants to have taken the precaution of using hydraulic props which might have prevented or at least broken the fall, and held that having omitted to take that precaution the defendants were in breach of their statutory duty. On appeal by the defendants:—

Held, that "reasonably practicable" did not mean "physically "possible," and it was not "reasonably practicable" to take precautions against a risk which was justifiably believed to be non-existent: that while the onus was on the defendants to prove that they had done what was reasonably practicable to secure the roof, they had discharged that onus, for according to the best assessment of the situation which could be made at the point of time immediately before the accident the measures necessary and sufficient to make the roofs of working places in this particular mine secure were or appeared to be the measures which had been normally adopted by the defendants, and those measures had been actually adopted.

Dicta of Tucker and Asquith L.JJ. in *Edwards* v. *National Coal Board* [1949] 1 K.B. 704 followed.

Decision of Jones J. reversed.

APPEAL from Jones J. sitting at Leicester Assizes.

On December 14, 1950, while working in the defendants' gypsum mine, the plaintiff's husband was killed by a fall of marl from the roof. He was, with another man, engaged in mining what is known as ball rock, which consists of a higher percentage of gypsum, and normally forms a stratum above the marl. The fall of roof was due to the unsuspected presence of what was described as "slickenside," which has an oily appearance, does not combine with the other soil, and if disturbed is liable to cause a quantity of marl to fall. For at least 18 years no slickenside had been discovered in the defendants' mine and no similar fall of roof had occurred, but the normal procedure for making the roof safe which had been followed was to tap the roof with a long-handled hammer and, if the noise indicated that the roof was unsound, to bring down the unsound portion. Since the accident to Marshall the defendants had provided hydraulic props which could be used as supports for the roof, and they had been used when slickenside had been suspected in places where men were working.

The present action, brought by the widow and administratrix of the deceased, was based on negligence at common law and on breach of statutory duty under the Metalliferous Mines Regulation

Act, 1872, s. 23, and the Metalliferous Mines General Regulations, 1938, para. 7 (3).[1]

The trial judge, in giving judgment, said that he had to decide whether the defendants had discharged the onus which was undoubtedly on them to make the roof, or to have this working place in this mine, secure so far as was reasonably practicable. There was nothing that they had done which was calculated to protect anyone in the mine against the fall that had occurred. On the other hand, it was a fall that was not easy or indeed possible to expect, and the cost of timbering would have been so prohibitive that the mine would cease to be worked. Whether that would be a sufficient reason for continuing to employ men in a place where there was danger of that kind it was not necessary for him to decide, because he had come to the conclusion that there was a precaution that the defendants might have taken, namely, the use of pneumatic props, which had been available for five years and were available at the time of this accident. He had formed the view that if such a precaution had been taken, although it was by no means certain that the death of Marshall would have been prevented, there was quite a possibility that it would have been prevented. He therefore held the defendants in breach of their statutory duty and awarded the plaintiff £2,834 5s. 3d.—£300 under the Law Reform Act and £2,534 5s. 3d. under the Fatal Accidents Acts.

The defendants appealed.

A. P. Marshall Q.C. and *A. E. James* for the defendants. Under the common practice of gypsum mining there is no timbering of any kind, or propping. Where work is about to be done the roof is tested by tapping with a long-handled hammer, and if there is any doubt whatever of the safety of a roof it is brought down before work is begun on the extraction of the gypsum. The judge has found that there was no negligence at all on the part of the mine-owners, but that there had been a breach of a regulation contained in section 23 of the Metalliferous Mines Regulation Act, 1872, and paragraph 7 (3) of the Metalliferous Mines General

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[1] Metalliferous Mines Regulation Act, 1872, s. 23: "The following "general rules shall, so far as may "be reasonably practicable, be ob- "served in every mine to which this "Act applies."

Metalliferous Mines General Regulations, 1938, para. 7 (3): "The roof "and sides of every travelling road, "outlet and working place shall be "made secure, and no person, unless "engaged in repairing or in investi- "gating the safety of the workings "shall travel in or work in any "travelling road or working place "which is not so made secure."

Regulations, 1938. Under that regulation there is not an absolute duty to make safe, but only " so far as is reasonably practicable." There is therefore no breach if the defendants prove that everything reasonably practicable has been done to make the roofs secure. The accident in the present case was due to a geological phenomenon—" slickenside." It is undetectable, because when tested by tapping it gives off a clear solid sound, whereas it is of such a nature that it does not combine with the other soil and if air gets in it falls down, constantly without warning. In practice it is only found in limited areas. This mine has been worked for 50 years, and no sign of slickenside has been seen in it before. It was therefore reasonable to regard this mine as free from this phenomenon. The defendants claim that they have done everything reasonably practicable to fulfil their duty, and it is submitted that the judge made a wrong approach to the question for decision. None of the experienced miners called for the plaintiff suggested that pneumatic props should have been used, and every witness called for the defence said that props would have been ineffective at the place where the accident happened. The defendants would not have discharged their duty under the Act by having props wherever men were working, because the duty of mine-owners was to make the whole mine safe so far as was reasonably practicable. The judge had really found against the defendants on the basis of an after-acquired knowledge.

R. T. Paget Q.C. and *E. Ling Mallison* for the plaintiff. The explanation that the fall of marl was due to slickenside was not put forward until half-way through the trial below. The defendants knew they were beginning to work on a new stratum, where slickenside, if it existed, was likely to be found, and if pneumatic props afforded additional safety they should have been used before the accident. Experience of marl under ball rock had led the defendants to believe there was no slickenside in this mine, but the precaution of tapping, which had proved to be an adequate method of testing low roofs, was not adequate for testing the new roof, of which the defendants had little or no experience. The roof in question was a relatively new roof and it had different characteristics which should have put the defendants on the alert. There is no evidence that because one stratum is free from slickenside another stratum can be assumed to be free also. The defendants were under a common law duty to be careful, when they broke into a new stratum, and not to assume that it was safe. They ought to have been on their guard against slickenside and have made examinations. Their failure to anticipate different conditions and to guard against possible dangers amounted to negligence. If pneumatic props were of doubtful efficacy, then the defendants had no right to mine ball rock at all. Under the Act of 1872 and the regulations of 1938 the mine-owner is made an insurer of his workmen. The words "so far as may be reasonably practicable" qualify the means of security and not the need. The regulation provides that the need exists, and it is not open to the employer to say: "I should not "in the circumstances provide against the risks." He can only say: "I could not." The duty is absolute and the words "reasonably practicable" are concerned with whether it can be done and not with whether it should be done.

[SOMERVELL L.J. When it says "shall be made secure" it must suggest to the ordinary person that it only applies to places which are known to be insecure, and not to a danger of which the employer had no knowledge.]

The mine-owners knew that things like slickenside existed. In *Edwards* v. *National Coal Board*[2] Tucker L.J. said there was no dispute that the joint effect of sections 49 and 102 (8) of the Coal Mines Act, 1911, was to impose upon the mine-owner the absolute duty to make the roof and sides of every travelling road secure, and that he could only escape civil liability for breach of this duty if he could prove—the onus was on him—that it was not reasonably practicable to avoid or prevent the breach. The defendants in the present case had never applied their minds to their absolute duty under para. 7 (3), but had been content to rely on the ordinary precaution of tapping.

[SOMERVELL L.J. It is right to say that the employers are insurers. I think Tucker L.J. admits that you must take into consideration such matters as whether the employer was unaware of and had no reason to suspect danger.]

The regulation says it shall be made secure and it is no defence to say: "I believe it to be secure." The only defence is "It was not reasonably practicable."

Cur. adv. vult.

November 21. SOMERVELL L.J. The judge found that there was no negligence at common law and in my opinion he was plainly right. We are now concerned with an alleged breach of statutory duty arising under words which are to be found in section 23 of the Metalliferous Mines Regulation Act, 1872, and the Metalliferous

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[2] [1949] 1 K.B. 704.

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Mines, General Regulations, 1938, para. 7 (3). The relevant words are as follows: "The following general rules shall so far "as shall be reasonably practicable be observed in every mine to "which this Act applies.—The roof and sides of every travelling "road, outlet and working place shall be made secure, and no "person, unless engaged in repairing or in investigating the "safety of the workings shall travel on or work in any travelling "road or working place which is not so made secure."

The judge found there was a breach of statutory duty and from that decision the defendants appeal. We have a plan and photographs of the mine. Broadly speaking the gypsum is removed from the various areas as they come into working, supporting pillars being left in between what are described as faces. The normal formation is first of all a layer or stratum of gypsum, above this is a stratum of marl, above this again a stratum of what is called ball rock which is gypsum but contains a higher percentage of that mineral and is harder to work; above that stratum again there is a further stratum of marl. It is common ground that the normal procedure for making the roof secure, which had been followed in this mine, is to tap the roof and if the noise indicates that the rock is not sound to bring down the unsound portion. Apart from the condition which I will mention later and which caused this accident, the result is a solid rock roof which is safe and secure.

As the judge here found, the deceased man, the man who was working with him and the foreman or chargehand, Mr. Gunn, all together tapped and inspected the roof; they carried out these duties properly, and applying the common law test there were no grounds for suggesting that anything further should have been done. The judge found that the fall was due to a condition known as "slickenside." When this condition exists there is a quantity of marl which is liable to fall if disturbed, but when tapped gives out the noise of sound solid rock. The condition is admittedly unusual anywhere. Mr. Mitchell, a mining engineer, who gave evidence, was familiar with the whole mine and had never encountered it in this mine during the six years he had been there. Mr. Bowley, who had been employed as a miner in the mine for some 18 years, had never heard of slickenside in this mine and had never seen a fall such as that which caused the death of the deceased. Mr. Baxter, who had been there for 25 years, described it as something quite unique in his experience.

At the time of the accident work was being done by the deceased and the man working with him on the ball rock stratum. Mr. Paget asked us to draw the conclusion from the evidence that the defendants had only quite recently started to work on the ball rock stratum; he further submitted that they should have realized that the marl above the ball rock was more likely to have slickenside than that below, and that therefore one ought to dismiss as irrelevant the absence of any similar happening in the past, to which I have referred. Our attention was drawn by Mr. Paget and Mr. Marshall to the various passages in the evidence, and I am satisfied that Mr. Paget's submission fails. Although there has been more working of ball rock in the last six years, it is to my mind clear from the evidence that ball rock has been worked in this mine over the whole period to which the witnesses speak. This case therefore must be approached on the basis that in this extensive mine, where ball rock had been mined certainly for 18 years, there had been no slickenside and no fall such as that to which I have referred. The process I have described had made the roof secure.

With regard to the marl in the area in which work has been carried on since the accident there have been found further slickensides, or evidence which has been thought to indicate slickensides. The defendants have provided hydraulic props which can be used with or without wood as supports for the roof, and they have been used when slickenside has been suspected in places where men have been working. Some at any rate of the witnesses did not regard them as very satisfactory, but the judge came to the conclusion on the evidence that they were, or at any rate might afford, some protection and might have protected the deceased if they had been there in the present case.

I will read the paragraph of the judgment in which the judge comes to his final conclusion: " What I have really to decide is " whether the defendants have discharged the onus which is " undoubtedly upon them to make the roof, or to have made this " working place in this mine, secure so far as was reasonably " practicable for them to do so. There was nothing that they did " which was calculated to protect anyone in the mine against the " fall that occurred. On the other hand, it was a fall that was " not easy or indeed possible to expect and it is said that if the " workmen at that particular place could have been protected " against this emergency the workmen in the other parts of the " mine should have been protected also, and the cost of doing " that would be quite prohibitive. I agree that to timber the

" whole of this mine would probably involve such a cost that the " mine would cease to be worked, but whether that would be " sufficient reason for continuing to employ men in a place where " there was danger of this kind it is not necessary for me to " decide, because the conclusion I have come to, as I have " probably indicated already, is this, that I think the evidence in " this case shows that there was a precaution that the defendants " might have taken. I think that they might have made use of " these pneumatic props. I was told they had been available for " five years and, therefore, they were available at the time this " accident happened. In view of the fact that all the witnesses " seem to know about slickenside and know that unexpected " things might happen, it seems to me, as there was this duty " on them to make this roof of this working place secure so far " as was reasonably practicable, they ought to have taken this " practicable step of equipping themselves with these pneumatic " props as they have done since. The view I have formed, " although it is not altogether supported by all the evidence that " has been given, is that if such a pneumatic prop had been used " at the time, although it is by no means sure that the death of " this man would have been prevented, there is quite a possibility that it would have been prevented through the fall of " roof having been broken in some way or dissipated so that the " amount that fell on the deceased man would have been smaller " than was in fact the amount that actually fell on him."

I feel a difficulty about this conclusion, and I will state my difficulty before considering the authority on which the plaintiff relies. The possibility of slickenside was, as the judge said, one which nobody expected, or could have expected, in this mine, having regard to past experience. Yet the suggestion is that the defendants have been in breach of their duty ever since the mine began to be worked, or at least since these props were invented, because they did not have available, and presumably did not compel or try to compel their men to use, some form of prop or support. One thing seems plain, and Mr. Paget was, I think, inclined to agree, namely, that the men would object very much to being asked day after day to put up props under roofs which had been tested and made secure in the way I have described and which everyone believed to be as safe as a roof could be. I would have said, therefore, that in this mine the tapping procedure was an observation of the rule so far as was reasonably practicable. It is not reasonably practicable to have elaborate precautions taken day after day against a risk which is believed to be non-existent.

The question then is whether the authority relied upon compels me to come to a different conclusion. The case is *Edwards* v. *National Coal Board.*[3] Section 49 of the Coal Mines Act, 1911, provides that the roof and sides of every travelling road and working place shall be made secure. The provision as to reasonable practicability instead of occurring as opening words is to be found in section 102 (8), which provides that "The owner of a mine shall not be liable to an action for "damages as for breach of statutory duty in respect of any "contravention of or non-compliance with any of the provisions "of this Act if it is shown that it was not reasonably practicable "to avoid or prevent the breach." The different arrangement of the provisions might possibly, at certain stages of a case, lead to different conclusions as to the onus of proof, but for the purpose of the present case, where all the evidence is before the court, there is, in my opinion, no difference in the construction and application as between the two sets of statutory provisions. In *Edwards* v. *National Coal Board*[3] the death had been caused by a latent defect referred to as a glassy slant, which would appear to have some similarity to slickenside in that it could not be discovered by ordinary processes. In *Edwards'* case, however, there was undisputed evidence that glassy slants had been previously seen in the roadway where the accident happened, although they were rare.

The trial judge in that case decided, as I gather, without evidence, that the accident could only have been prevented by propping and lining throughout the roads of the defendants' mines and that this was not reasonably practicable. This was reversed in this court. It was held that section 49 imposed an absolute duty to make secure and the onus rested on the defendants to satisfy the court that it was not practicable. Having called no evidence they had failed to discharge that onus. It is suggested, as I understand it, on behalf of the present plaintiff, that the unlikelihood of the "insecurity" to be guarded against is irrelevant. If the roof turns out to be insecure then there is an offence, however impossible it was to foresee that insecurity, provided that some reasonably practicable measure is available once its possibility is realized.

If this were right, there is a good deal in Tucker L.J.'s judgment which one would not have expected to find there. He says, for example, that evidence to show that glassy slants were more common in some formations and areas than others, and that they were non-existent in some areas, would be relevant. He also holds, and this I think is not disputed by the plaintiff in the present case, that costs in relation to risk to be guarded against could properly be considered. Asquith L.J. adopted the same view, though he may have indicated that in his opinion the onus would have been more easily discharged. Singleton L.J., as I read his judgment, places the onus on the owners somewhat higher, but as it seems to me, in so far as there is a difference, we are bound by the views expressed by the majority.

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[3] [1949] 1 K.B. 704.

The references to which I have referred in the judgment of Tucker L.J. support, I think, the conclusion to which I have come, and I would allow the appeal.

JENKINS L.J. I agree. The claim based on negligence at common law having been rightly rejected by the judge, the appeal turns on the true construction, and relation to the facts of this case, of paragraph 7 (3) of the Metalliferous Mines General Regulations, 1938, read in conjunction with the prefatory provision contained in section 23 of the Metalliferous Mines Regulation Act, 1872, which must now be taken as qualifying the regulations of 1938, by virtue of their substitution for the general rules originally set out in the section itself.

The defendants, accordingly, were at the time of the fatal accident to the plaintiff's husband under a statutory duty to make secure the roof and sides of every travelling road, outlet, and working place in their gypsum mine, and in particular the roof of the working place by the fall of which the plaintiff's husband was killed, so far as it might be reasonably practicable for them to do so. As the event proved, the roof in question was not in fact secure, for it fell and killed the plaintiff's husband. But that misfortune did not in itself constitute a breach of the statutory duty, inasmuch as it was not an absolute and unqualified duty to make the roof secure, but a duty to make the roof secure so far as it was reasonably practicable to do so, or, in other words, to do everything which it was reasonably practicable to do for the purpose of making the roof secure.

In *Edwards* v. *National Coal Board*,[4] with respect to the comparable provisions there in question of sections 49 and 102 (8) of the Coal Mines Act, 1911, Asquith L.J. said: "'Reasonably "'practicable' is a narrower term than 'physically possible'

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[4] [1949] 1 K.B. 704, 712.

"and seems to me to imply that a computation must be made "by the owner, in which the quantum of risk is placed on one "scale and the sacrifice involved in the measures necessary for "averting the risk (whether in money, time or trouble) is placed "in the other; and that if it be shown that there is a gross "disproportion between them—the risk being insignificant in "relation to the sacrifice—the defendants discharge the onus on "them. Moreover, this computation falls to be made by the "owner at a point of time anterior to the accident. The "questions he has to answer are: (a) What measures are necessary and sufficient to prevent any breach of section 49? (b) Are "these measures reasonably practicable?"

With these observations I respectfully agree, and would add by way of corollary that if, according to the best assessment of the situation which could be made at a point of time immediately prior to an accident caused by a fall of roof in a working place, certain measures were or appeared to be all that was necessary to make the roofs of working places secure, and if those measures had in fact been taken, then the owner concerned would, for the purposes of section 23 of the Act of 1872 and paragraph 7 (3) of the 1938 regulations, have done all that was "reasonably practicable" to make the roofs of working places secure, and the insecurity of the particular roof, proved by the fall which did in fact occur, would not constitute a breach by him of the relevant statutory duty.

In the present case the uniform experience of many years working had shown the nature and consistency of the strata in this particular mine to be such that a roof would be secure provided any loosely-attached rock adhering to it was brought down, and further that the presence of any loosely-attached rock would be detected by inspecting the roof for visible flaws and by sounding it with hammers. This accorded with common experience in gypsum mines, where it had been the general practice not to provide artificial support for roofs, the procedure of inspecting and sounding, and bringing down any loose rock detected, having been found to be all that was necessary to make them secure. It seems to me, therefore, that according to the best assessment of the situation which could be made at a point of time immediately prior to the accident the measures necessary and sufficient to make the roofs of working places secure in this particular mine were or appeared to be (i) to inspect and sound them for the purpose of detecting any loosely-attached rock; and (ii) to bring down any loosely-attached rock so detected. The roof of the working place in which the accident occurred was duly inspected, sounded, and found to all appearances secure, before the deceased started work on the morning of the accident. It follows that if I am right in the construction I place on the words "so far as may be reasonably practicable" in section 23 of the Act of 1872, the defendants were not in breach of the relevant statutory duty, for, although the roof fell and therefore was demonstrably not in fact secure, the defendants had done all that was reasonably practicable to make it secure.

It is, of course, vital to the conclusion in favour of the defendants reached by the above process of reasoning to be able properly to hold that the best assessment of the situation which could be made at a point of time immediately prior to the accident would not have included, as a contingency to be guarded against, the possibility of slickenside, that rare condition of the strata not detectable by sounding, and only sometimes by inspection, and then only if suspected, which did in fact occasion the fall in the present case. So far as the evidence goes, slickenside is a known but unusual geological phenomenon; it had never been encountered before in these workings; there was no reason to suspect its presence, and the probabilities were all against its occurrence here. According to the argument for the plaintiff the mere fact that slickenside was a geological possibility was enough to make it a matter which the defendants' assessment of the situation should have included, and, if it was a matter which should have been included in such assessment, it was one against which it would have been reasonably practicable to provide by expedients such as the hydraulic props brought into use since the accident, which would or might have prevented the fall. I think this argument rates the defendants' duty too highly, as it in effect requires them to take into account in their calculation every conceivable possibility however remote. Slickenside was a danger the presence of which there was no ground for suspecting, and was indeed against all the probabilities of the case; and in my view it cannot fairly be said to be "reasonably practicable" to guard against a contingency that could not reasonably have been foreseen, inasmuch as its occurrence would be contrary to all previous experience.

An extreme form of the argument on the plaintiff's side is to the effect that in considering what is reasonably practicable regard should be had exclusively to what would have been possible as a matter of engineering in the way of providing support for roofs and sides without making the working of the

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mine physically or economically impossible; and that it is for this purpose irrelevant to inquire what measures were or appeared to be necessary and sufficient to make roofs and sides secure according to the best assessment of the situation which could have been made immediately prior to the accident. This means, in other words, that what is reasonably practicable to make roofs and sides secure must be judged without reference to what appears to be necessary for that purpose. On this view a mine owner might be advised by the best mining engineers in the country that a roof in his mine was perfectly secure without artificial support, which would be wholly superfluous and a mere waste of time, labour and money, but he would nevertheless be obliged to put in artificial support as otherwise he would not have done all that was reasonably practicable to make the roof secure, and would be liable if, through some unforeseeable happening, it fell and injured someone working under it.

Again, if he did put in some form of artificial support of a certain design and strength, selected after careful consideration as adequate to support some particular roof, and owing to some unforeseeable happening a fall of quite exceptional size occurred, which the support provided did not suffice to prevent, it would avail him nothing in a suit by some workman injured by the fall to say with truth: "I went into the whole matter very carefully, and I was satisfied that support of this design and strength was sufficient to prevent any fall of which there was any foreseeable risk." He would nevertheless be in breach of his statutory duty on proof that support of greater strength or better design could have been provided as a matter of engineering, without making the working of the mine physically or economically impossible, and would or might have prevented the fall in question.

I reject this argument as stretching the mine owner's duty far beyond what is "reasonably practicable" according to any rational construction of that expression. To my mind that which is "reasonably practicable" in this context is no more nor less than what is capable of being done to make roofs and sides secure within the limits of what it is reasonable to do; and it cannot be reasonable to do for this purpose anything more than that which it appears necessary and sufficient to do according to the best assessment of what is necessary and sufficient that can be made at the relevant time, that is, in the present instance a point of time immediately prior to the accident. I should add that on the evidence I reject, as does my Lord, the contention

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on the part of the plaintiff that the ball rock stratum, which was being worked at the time of the accident, and the strata overlying it, constituted, so to speak, terra incognita to the behaviour of which past experience was no guide.

The conclusion to which I have come seems to me to be directly supported by the passage I have quoted above from the judgment of Asquith L.J. in *Edwards* v. *National Coal Board.*[5] I think it is also indirectly supported by the judgment of Tucker L.J. in the same case, for in discussing what evidence might have been adduced by the National Coal Board to show that everything reasonably practicable had been done, he says[6]: "Again, they might prove that in some areas no propping or "lining was necessary, for some particular reason, or that "different methods were required in some localities. Dealing "with the particular latent defect which caused this accident—a "glassy slant—it might perhaps have been possible to show that "they are more common in some formations and areas than "others, or that they are non-existent in some places. I know "not. But this is the kind of evidence which, in my opinion, "would have been relevant."

It is true that in *Edwards* v. *National Coal Board*[5] the actual decision was against the defendants, and that in his judgment Singleton L.J., the third member of the court, expressed views which, if accepted in their entirety, might lead to a similar result in the present case. But the facts of that case were very different, inasmuch as other instances of the latent defect which caused the accident—"glassy slant"—had previously been found from time to time in the very roadway in which the accident occurred. Accordingly, the decision in *Edwards* v. *National Coal Board*[5] cannot be regarded as governing the present case, while the reasoning contained in the judgments of a majority of the court, on the whole, points to the conclusion that on facts such as those of the present case the claim based on breach of statutory duty should fail. That being my own opinion on the facts of this case, and what I conceive to be the true construction of section 23 of the Act of 1872 and paragraph 7 (3) of the 1938 Regulations, I agree that this appeal should be allowed.

HODSON L.J. I agree. The claim is based on negligence, which was negatived by the trial judge, and also on breach of statutory duty. The defendants having been held to be in breach

[5] [1949] 1 K.B. 704, 712.

[6] Ibid. 710.

of such duty are appealing against the judge's finding. The duty is contained in the Metalliferous Mines General Regulations, 1938, which have to be read with section 23 of the Metalliferous Mines Regulation Act, 1872. The duty imposed by the regulation itself is absolute. The question is whether the defendants are able to escape from the absolute duty by reason of the qualification contained in the words of section 23 of the Act, to the effect that the rules are to be observed as far as may be reasonably practicable.

The words "reasonably practicable" in their context have been considered by this court in *Edwards* v. *National Coal Board.*[7] That case arose on the meaning of sections 49 and 102 (8) of the Coal Mines Act, 1911.[8] [His Lordship read the sections and continued:] It was held that while section 49 of the Act imposed an absolute duty on the owners, by section 102 (8) the onus rested on them of proving that it was not reasonably practicable for them to perform that duty. In that case, the owners having called no evidence to assist the court to visualize the situation nationally, from the viewpoint of the monopoly owner, and never having considered the matter from the local angle, it was held that they had failed to establish their defence under section 102 (8). Although the arrangement of the sections in the two cases is slightly different, I do not think there is any material difference in their general effect. Accordingly, I think this court should hold itself bound to treat the onus as falling on the defendants to prove in order to escape their civil liability that it was not reasonably practicable for them to prevent the insecurity.

The first question is: what is meant by reasonably practicable? Mr. Paget argues with force that the words of qualification are directed not to the need for security but to the means of providing the security. He says that the employer cannot say "I should not have provided means of security"; he can only say "I cannot." This, I think, is making the words "reasonably practicable" approximate to "physically possible,"

[7] [1949] 1 K.B. 704.

[8] Coal Mines Act, 1911, s. 49: "The roof and sides of every travel-"ling road and working place shall "be made secure, and a person shall "not, unless appointed for the pur-"pose of exploring or repairing, "travel on or work in any travelling "road or working place which is not "so made secure."

S. 102 (8): "The owner of a mine "shall not be liable to an action for "damages as for breach of statutory "duty in respect of any contravention "of or non-compliance with any of "the provisions of this Act if it is "shown that it was not reasonably "practicable to avoid or prevent the "breach."

but Asquith L.J. pointed out in *Edwards* v. *National Coal Board*[9] that there is a distinction to be drawn between these expressions. Notwithstanding that the interpretation put forward by Mr. Paget is given support by the language of Singleton L.J. in the *Edwards* case,[9] I do not think it accords with the ratio of the judgments of the majority of the court, consisting of Tucker and Asquith L.JJ. Mr. Paget's argument is substantially the same as that negatived by the majority of the court in the *Edwards* case,[9] with this modification, that he recognizes that since that case was decided the question of relative cost must be considered in arriving at a conclusion on reasonable practicability. I do not think, however, that the qualification introduced into the absolute duty by the words "reasonably practicable" is limited to the question of cost. Tucker L.J. gave an indication of the kind of evidence which might be relevant on this matter where he said[10]: "Again they might prove that in some areas no "propping or lining was necessary for some particular reason or "that different methods were required in some localities. Dealing "with the particular latent defect which caused this accident "—a glassy slant—it might perhaps have been possible to show "that they are more common in some formations and areas "than others or that they are non-existent in some places." It seems to me that the decision of the court, certainly that of the majority, turned on the absence of any sufficient evidence that the owners in the *Edwards* case,[9] that is, the National Coal Board, had discharged the burden cast upon them.

It is, I think, therefore, for the court to inquire whether in the circumstances of this case the owners have proved that they did all that it was reasonably practicable for them to do to make secure the working place where the accident occurred. The knowledge that they had, or ought to have had, of the risk is, I think, relevant to the question of reasonableness. The owners sought to discharge the burden by saying that they have followed the normal practice of gypsum mining, that is, to inspect and tap the roof with a hammer and if the noise is hollow, showing the roof is "dummy," to bring the roof down. They said that this was the right way to make a secure roof and that the accident in this case was due to a geological phenomenon called "slickenside," against which it was not reasonably practicable for them to provide, because they had no reason to suspect its presence. The mine had been worked for 50 years, and the evidence covered the last 25 years during which slickenside had never been suspected. Slickenside is not detectable by tapping as the sound given out by rock so affected is the same as that emitted from sound rock.

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[9] [1949] 1 K.B. 704.

[10] Ibid. 710.

In this state of affairs, accepting the judge's finding that a system of propping might have been used to hold up a roof where slickenside in fact existed, and to prevent it falling or at any rate to break its fall, the evidence in this case shows that slickenside is a phenomenon familiar to mining engineers but it does not show that it was something which was reasonably to be expected in this mine in the light of past experience. I think, therefore, that the right conclusion in the light of the knowledge and experience of the defendants in working this particular mine, is that it was not reasonably practicable for them to secure the roof against the event which happened, namely, a fall due to "slickenside." It is a significant distinction between this case and *Edwards* v. *National Coal Board* [11] that in the latter "glassy "slant" had previously been observed in the actual roadway where the accident happened.

Mr. Paget sought to make the further point that the past experience in the mine was of no avail to the defendants because the trouble from slickenside occurred when the miners were working a different stratum from the one which they had been accustomed to work. The gypsum first worked lay in a thick stratum covered by a comparatively thin stratum of marl, which had proved a safe roof in the experience of the owners provided the normal steps of inspection, tapping and bringing down faulty roof were followed. Over the thin stratum the ball rock, largely consisting of gypsum, was being worked when the accident occurred and over this was a roof of marl in a much thicker stratum than that under the ball rock. Mr. Paget sought to read the evidence as showing that the ball rock had only recently been worked, thus uncovering the hitherto unknown stratum above it. In these circumstances he said that knowing of the possibility of slickenside in the new stratum the owners should have taken steps to prop and thus secure against falls of rock in this stratum, as they did after the accident in those places where they had their doubts about a roof in that they suspected slickenside. I do not think that the evidence leads to that conclusion. It is quite true that the working of the ball rock had been more extensive during the last six years in which Mr. Mitchell had been under-manager of the mine. He did indeed say that there had not been much ball rock getting previous to his going to the

[11] [1949] 1 K.B. 704.

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mine, but it is clear from the evidence of the other witnesses who worked in this mine that the ball rock had been worked over the whole period of their experience. This work would in each case involve exposing the roof in the higher stratum and the same test was applied to this stratum as to the stratum below the ball rock in order to make the roof secure by bringing down the bad roof when and where it was found to be "dummy." I think that Mr. Paget's submission on this point fails, since the evidence did not show that during the period immediately preceding the accident a new and untried area had been worked to which the owners' previous experience would be no guide. I would accordingly allow the appeal.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *Smith & Hudson, for Eking, Manning, Morris & Foster, Nottingham; Hawley & Rodgers, Loughborough.*

A. W. G.

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July 16, 17, 18;
Nov. 6.

Singleton, Birkett and Morris L.JJ.

DAVIES AND ANOTHER *v.* DU PAVER.

[Plaint No. G1029.]

Profit—Claim to pasture rights by prescription—Interruption of user—Protests by owner of dominant tenement followed by submission to interruption for more than one year—User as of right—Servient tenement occupied by sitting tenants during most of period of prescription—Common knowledge of grazing rights in locality—Onus of proof as to owner's knowledge and power to resist claim to private right—Prescription Act, 1832 (2 *&* 3 *Will.* 4, *c.* 71), *ss.* 1, 4, 5.

The plaintiff, as owner and occupier of a farmholding, claimed by prescription rights of pasture over hill sheepwalks, part of an adjoining holding, on the ground that he and his predecessors in title had enjoyed such user as of right for over 60 years without interruption. During 55 of the 60 years user relied on, sitting tenants had been in occupation of that adjoining holding. The defendant, when he became owner and occupier of the adjoining holding, put up a fence which effectually interfered with that user. While the fence was being erected, the plaintiff protested vigorously, and through his solicitors made it clear to the defendant that legal proceedings would be taken if the interference were persisted in;

but after the fence was completed, no protest by word or deed was made until more than a year later, when the plaintiff instituted proceedings in the county court, and the case proceeded as a claim to prescriptive rights under the Prescription Act, 1832.

The county court judge found that the plaintiff had not submitted to nor acquiesced in the interruption for one year within the meaning of section 4 of the Prescription Act, 1832; that the plaintiff had had open and uninterrupted enjoyment for 60 years; that it was common knowledge that the plaintiff's sheep were grazing on the land in question; and that the owner of the servient tenement could have shown that he did not acquiesce in the user. He gave judgment for the plaintiff.

On appeal by the defendant, the plaintiff relying before the court on a claim to prescriptive rights both under the Act of 1832 and at common law:

Held (1) by Birkett and Morris L.JJ., Singleton L.J. dissenting, that the findings of facts by the county court judge that the interruption had not been submitted to nor acquiesced in ought not to be disturbed.

Per Birkett L.J.: Submission to or acquiescence in an interruption is a state of mind evidenced by the conduct of the parties, and is not to be decided merely by saying that there was in fact a period of a year in which nothing was done.

Per Singleton L.J., dissenting: The fact that there was a period of more than one year in which nothing whatever was done is fatal to the plaintiff's claim under the Prescription Act, 1832, s. 4. The evidence was clear that there was submission to the interruption for a year:—

Held further (2) by Singleton L.J.: The plaintiff's claim under the common law could not succeed before the court, since he had not in the county court sufficiently discharged the burden of proof on him as to the servient owner's knowledge or means of knowledge so as to enable the county court judge to consider that issue:—

And by Birkett and Morris L.JJ., reversing the decision of the county court judge on the claim to long enjoyment under the Prescription Act, 1832, s. 1, that where the owner of land claims, whether under the Act or at common law, a private right of user over the land of another, he must prove that, during the period of prescription required by law, the owner of the servient tenement had specific knowledge or the means of knowledge of the user, and power to object to it. Knowledge in the owner cannot be inferred from the fact that there was "common knowledge" of the user in the locality; a fortiori where during most of the period relied on the servient tenement was in the possession of sitting tenants.

APPEAL from Judge Ernest Evans sitting at Portmadoc and Blaenau Festiniog County Court.

The plaintiff, John Davies, as owner and occupier of the farmholding Tryfal, in the parish of Festiniog, Merioneth, and Griffith Tecwyn Jones, the second plaintiff in the original county court action, as owner and occupier of another farmholding in the same parish, claimed that they and their predecessors in title had enjoyed rights of pasture for their sheep for more than 60 years over portions of certain hill sheepwalks which they believed to be Crown wastes. In fact, an area of 12½ acres, the area material to this action, formed part of the neighbouring farmholding, Hafod Ysbytty, which from September, 1949, was owned and occupied by the defendant, M. Paul du Paver.

The history of Hafod Ysbytty, the servient tenement, so far as relevant to the case, was as follows: for some 40 years prior to 1929 it had been tenanted by one Jones, the father of the second plaintiff; the then owner of the freehold, Mr. Casson, who lived some distance away, died during that tenancy, and his widow became the owner. The tenant Jones died in 1929, and his son, the second plaintiff, remained on as tenant until in 1941 he and his wife became joint owners by purchase of Hafod Ysbytty. In 1944, they sold it to one Sontag, who in 1946 let the farm (but not the house) to one William Roberts, who, while he was in occupation, drove off the plaintiffs' sheep from the sheepwalks. In 1949, Hafod Ysbytty was conveyed by Sontag to the defendant, du Paver, who entered into occupation. He at once submitted a scheme to the Ministry of Agriculture under the Hill Farming Act, 1946, for the construction of a stock-proof fence around his farm. The fencing, so far as material to the action, was begun in May, 1950, and completed on August 9, 1950. It enclosed an area of about 12½ acres of the land on which the plaintiffs had previously grazed their sheep.

As soon as the work on the fence came to the knowledge of the plaintiffs, they asked the National Farmers' Union for advice, and met the defendant and the Union representative on the site, where they made it clear to the defendant that they objected to his action. They then instructed solicitors to act on their behalf, and on July 6, 1950, the solicitors wrote to the defendant saying that unless he refrained from further work on the fence, proceedings would be taken against him. The defendant, through his solicitors, rejected that complaint, and on August 1, 1950, the plaintiffs' solicitors wrote: "We have today "heard further from our clients, and we understand that your "client's acts of fencing are interfering with our clients' rights "of pasture, and we have instructed our clients to take such "steps as they think necessary to prevent further infringement. "Owing to your client's conduct our clients are compelled to "take the necessary steps to assert their rights."

The defendant's solicitors replied on August 2, 1950: "We "can only repeat that if the steps which you have advised your "clients to take to assert their alleged grazing rights in any way "interfere with or infringe our client's rights as the owner of the "freehold, he will be compelled to take action to protect his "rights. We trust this letter makes our client's position perfectly clear as we would not like your clients to be under any "misapprehension as to the consequences which would flow from "the commission of unlawful acts."

The fence was completed on August 9, 1950, and effectually excluded the plaintiffs' sheep from the 12½ acres in question. No other steps were taken by or on behalf of the plaintiffs by word or deed until the issue of a summons on September 28, 1951, nearly 13 months after the last objection by their solicitors.

The plaintiffs claimed damages and an injunction to restrain the defendant from interfering with their enjoyment, as appurtenant to their ownership and occupation of their respective farmholdings, of certain exclusive rights of pasturage over "the "Crown wastes of the parish" by the wrongful erection of fences. That description was amended on November 28, 1951, to "lands sometimes described as Crown wastes," after it had been established by a survey and plans that the 12½ acres were in fact part of the defendant's own land; and the plaintiffs' claim was then to rights of common of pasture by prescription and/or the Prescription Act, 1832,[1] s. 1, the plaintiffs having enjoyed the rights as of right without interruption for 60 years before the action.

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[1] The Prescription Act, 1832, provides:—

S. 1: "'Whereas the expression "'"time immemorial, or time whereof "'"the memory of man runneth not "'"to the contrary," is now by the "'law of England in many cases con"'sidered to include and denote the "'whole period of time from the reign "'of King Richard the First, whereby "'the title to matters that have been "'long enjoyed is sometimes defeated "'by shewing the commencement of "'such enjoyment, which is in many "'cases productive of inconvenience "'and injustice;' for remedy thereof "be it enacted . . . that no claim "which may be lawfully made at the "common law, by custom, prescrip"tion, or grant, to any right of com"mon or other profit or benefit to be "taken and enjoyed from or upon any "land of our Sovereign Lord the King, "his heirs or successors, or any land "being parcel of the Duchy of Lan"caster or of the Duchy of Cornwall, "or of any ecclesiastical or lay per"son, or body corporate, except such "matters and things as are herein "specially provided for, and except "tithes, rent, and services, shall, "where such right, profit, or benefit "shall have been actually taken and "enjoyed by any person claiming "right thereto without interruption "for the full period of thirty years, "be defeated or destroyed by shewing "only that such right, profit, or bene"fit was first taken or enjoyed at any "time prior to such period of thirty "years, but nevertheless such claim "may be defeated in any other way

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The defendant by his defence claimed that the fences had been erected on the boundary of his own land in the lawful exercise of his rights as the freehold owner of Hafod Ysbytty. He denied that the plaintiffs' user had lasted for any period required by law, and pleaded alternatively that if there had been such enjoyment, it had been interrupted for more than one year before the action was brought, during which year the plaintiffs had acquiesced in or submitted to the interruption, so that their claim was defeated under sections 1 and 4 of the Prescription Act, 1832. He also contended that, in order to establish their claim as of right, they must show that during the 60-year period relied on, the owners of the servient tenement, the defendant's predecessors in title, had knowledge, actual or constructive, of the user by the plaintiffs, and also the power to object to it; but that as, during 55 years of that period, the defendant's holding had been in the possession of sitting tenants, those requirements could not have been satisfied.

At the county court hearing, evidence was given by farm-workers from adjoining farms, aged 72 and 76 years respectively, that they had looked after sheep on the sheepwalks in question for over 60 years, and by the second plaintiff, who was joint owner of Hafod Ysbytty from 1941 to 1944, that he knew of the sheepwalks.

The county court judge, in a reserved judgment on May 16, 1952, held that neither of the plaintiffs submitted to or acquiesced in the interruption caused by the fence. He found

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"by which the same is now liable to "be defeated; and when such right, "profit, or benefit shall have been so "taken and enjoyed as aforesaid for "the full period of sixty years, the "right thereto shall be deemed "absolute and indefeasible, unless it "shall appear that the same was "taken and enjoyed by some consent "or agreement expressly made or "given for that purpose by deed or "writing."

S. 4: "And be it further enacted, "that each of the respective periods "of years herein-before mentioned "shall be deemed and taken to be "the period next before some suit "or action wherein the claim or "matter to which such period may "relate shall have been or shall be "brought into question, and that no "act or other matter shall be deemed "to be an interruption, within the "meaning of this statute, unless the "same shall have been or shall be "submitted to or acquiesced in for "one year after the party interrupted "shall have had or shall have notice "thereof, and of the person making "or authorizing the same to be "made."

S. 5: ". . . in all pleadings to "actions of trespass, and in all other "pleadings wherein before the passing "of this Act it would have been "necessary to allege the right to "have existed from time immemorial, "it shall be sufficient to allege the "enjoyment thereof as of right by the "occupiers of the tenement in respect "whereof the same is claimed for and "during such of the periods men-"tioned in this Act as may be applic-"able to the case. . . ."

that the first plaintiff had had uninterrupted enjoyment nec vi nec clam nec precario for 60 years as appurtenant to the ownership of his farm; that it was common knowledge that the plaintiffs were grazing their cattle on those pieces of land; and that even though the owner of the servient tenement might not have been able to take action in the courts, he could have acted in such a way as to show that he did not acquiesce in what the plaintiffs were doing throughout the period of prescription. He granted to the first plaintiff Davies the injunction asked for and £10 damages. As against the second plaintiff, he gave judgment for the defendant, on grounds not relevant to the appeal. The second plaintiff was not a party to the appeal and his part in the action does not call for report.

The defendant appealed.

Before the county court judge the claim proceeded on the basis of the Prescription Act, 1832, only.

W. L. Mars-Jones for the defendant. It is submitted:—(1) As neither the plaintiff nor any agent on his behalf expressed any disapproval of the fence—which constituted an absolute stoppage of his right to graze—from its completion on August 9, 1950, until proceedings were begun on September 28, 1951, that was an interruption of his user for one year within the meaning of section 4 of the Prescription Act, 1832. The judge made an order in the plaintiff's favour on the mistaken finding that there had been "protracted correspondence" between the parties during those 13 months when in fact there had been no correspondence. The effect of sections 1 and 4 read together is that the plaintiff must prove three propositions: (1) enjoyment of the right for a period of 60 (or 30) years ending on the date when proceedings are begun; (2) such enjoyment without interruption for one year; (3)—if there has been such interruption for one year—that he did not acquiesce in or submit to it: see *Presland* v. *Bingham* [2] on the onus of proof, where the dicta of Cotton [3] and Lindley [4] L.JJ., though obiter, correctly interpreted the section.

[SINGLETON L.J. Is there authority as to what constitutes "submission to" within this or any other section?]

Yes: see *Glover* v. *Coleman*,[5] where the protests were made within the year. There is no reported decision since 1832 where any protest or act outside the 12-month period has been relied on to show non-submission.

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[2] (1888) 41 Ch.D. 268.

[3] Ibid. 274.

[4] Ibid. 276.

[5] (1874) L.R. 10 C.P. 108.

These are valuable rights acquired by user, and the section is intended to protect the owners of both the dominant and the servient tenement. If the plaintiff wishes to establish them under the Act and the owner of the servient tenement interrupts the user, the plaintiff has 12 months in which to do something. If he does nothing during that period, he has lost his right and must start again. Any departure from this strict reading of the Act would be lamentable. The defendant should be entitled to assume that if 12 months go by without protest, nothing more will be done.

[MORRIS L.J. Suppose the plaintiff writes a letter saying: "I strongly object to this and my objection is a continuing "one"?]

If he goes to sleep on his right for a year, he has lost the right to do so. One single meeting or protest during the 13-month interruption would have been some, though weak, evidence; but here there was nothing.

[MORRIS L.J. If one meeting would be good evidence to show the plaintiff's state of mind, could not letters, etc., *before* the year be equally good evidence?]

It is not just a question of the plaintiff's state of mind, but whether he expressed it to the defendant by word or deed: see section 4. The apparent difficulty in construing the section has been dealt with in *Flight* v. *Thomas*.[6] It takes 30 or 60 years to acquire the right, but only 12 months of failure to contest it to lose it. The right is inchoate and cannot be made prescriptive until action brought. The drafters of the section could not have envisaged a protest having a continuing effect, for that would destroy the value of the 12-month period.

[SINGLETON L.J. Otherwise the effect of one protest might last for ever. The statute gives protection both ways, though it is a terrible hardship on the plaintiff if you are right on this point.]

It is submitted (2) the fundamental principle of the doctrine of prescription, whether at common law or under the Act, is that the enjoyment relied on must be "as of right" and such that the owner in fee simple of the servient tenement has notice of it, either actual or constructive, *and* the power to resist it. The county court judge found that for 55 years out of the 60-year

[6] (1841) 8 Cl. & F. 231, 243.

period relied on, the servient tenement had been in the occupation of tenants. Therefore time did not run against the owner. Possession was the only right which was being infringed, and that right was in the sitting tenant. In addition, from 1946 to 1949 the then tenant, Roberts, was resisting the plaintiff's user.

[SINGLETON L.J. If a landlord draws rent and lets the place to various tenants, and sometimes lives there himself, can prescription at common law never run?]

Never, unless it can be established that the owner of the servient tenement was in occupation before he started letting the property: see Megarry, Manual of Real Property, 1st ed., at pp. 439–440, as to presumed grant of lawful origin.

[BIRKETT L.J. The judge found against you on this point.]

Yes, having found the facts in my favour.

[BIRKETT L.J. He seems to be saying that it was "common "knowledge," and therefore the servient owner knew, and had the means, if not of preventing user, at least of showing non-acquiescence.]

The judge could not have found that the owners had any knowledge that there were sheep other than those of the tenants grazing on that little piece of land. All the authorities on constructive notice of user have concerned cases of support where it was obvious to any reasonable owner that one building was dependent on the support provided by the servient tenement; I have found no case where knowledge has been imported to an absentee landlord: see *Sturges* v. *Bridgman*,[7] and *per* Fry J. and Lord Penzance in *Dalton* v. *Angus*.[8] The onus is on the plaintiff to show actual or constructive notice and power to prevent the user by act or action in court: see *Union Lighterage Co.* v. *London Graving Dock Co.*[9] and Eve J. in *Liverpool Corporation* v. *H. Coghill & Son*,[10] and also the cases considered in Gale on Easements, 12th ed., pp. 221–222, and his own view, which sets out the point shortly and accurately.

Gilbert Dare for the plaintiff. Section 4 of the Prescription Act, 1832, does not say "within one year from the interruption." Look at the words. The interruption may be long before the year of acquiescence. In all cases the year's acquiescence which must be found is a question of fact. My friend says that there must be something done in the 12 months and nothing done before that can be taken into account by a jury. That was considered in

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[7] (1879) 11 Ch.D. 852, 863.

[8] (1881) 6 App.Cas. 740, 774, 803.

[9] [1902] 2 Ch. 557.

[10] [1918] 1 Ch. 307, 313–4.

Glover v. *Coleman*[11] and *Bennison* v. *Cartwright*.[12] But because it is a question of fact, the jury must have all the facts as to what happened in May, June and so on. It is quite wrong to say that it is a matter of pure law, and that whatever objection is taken you cannot look at it the day after the year has run.

[BIRKETT L.J. You say that a jury would be entitled to say: "These people never submitted. They protested and wrote their "letters. It is true that for 12 months after that they were "quiet, but their protest must be taken as continuing"?]

Continuing for such reasonable time as the jury thought right. The time would come when a jury would say: "It is too late." Here they might say that the plaintiff had been a bit slow; but the judge had ample evidence on which he was entitled to find that there had not been submission for a whole year, for he knew that the parties were girding themselves for the fray and pressing for trial. There is only a six-week gap to bridge. The protests were clear and forcible, and must have some effect.

[SINGLETON L.J. But Grove J. in *Glover* v. *Coleman*[13] says, "it must in all cases be a question of degree." If you do nothing except allow the fence to remain, you are in fact submitting to it for one year.]

That is a question of fact for the jury.

[SINGLETON L.J. I wish I could see it your way; but there must be *some* evidence of something done within the year.]

Your Lordship is now laying down a rule of law that there must be something done within the year; but the statute does not say that. The true principle is that we must submit for a whole year and that is a question of fact for the jury.

[MORRIS L.J. How far is it material that following on the correspondence an action was begun. The view against you involves the assumption that on August 9, 1950, you had given up the whole matter.]

It is very relevant. No one could have thought that there was submission.

The plaintiff, however, does not require the Act to prove his case, for since his original pleading was prescription it is wide enough for him to rely before this court on prescription at common law, though in the county court he relied on the Act. The county court judge found as a fact that he had enjoyed grazing rights for 60 years and that they were capable of forming the subject-matter of a grant. At common law the period of enjoyment which had to be proved was originally "time immemorial," but was later fixed at 1189: see Cheshire's Modern Real Property, 6th ed., p. 242; see also Willes J. in *Darling* v. *Clue.*[14] But "living "memory" is now held sufficient. The authorities show that a claimant at common law must show enjoyment "as of right" of a right or profit which could be the subject of a grant, for the period of "living memory." On the judge's findings, the plaintiff here has satisfied all those requirements. Though the judge did not find a common law prescriptive right, his finding is sufficient for the courts to presume user from time immemorial unless it can be shown to have been interrupted: see *per* Blackburn J. and Cockburn C.J. in *Bryant* v. *Foot.*[15]

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[11] L.R. 10 C.P. 108.

[12] (1864) 5 B. & S. 1.

[13] L.R. 10 C.P. 108, 124.

[SINGLETON L.J. But as everyone in the county court agreed to conduct the case on the footing of the Prescription Act, 1832, I do not think we have all the material on which to decide the claim at common law. It would have to go back to the county court.]

On the prescriptive claim under the Act, the judge found that it was "common knowledge" that the plaintiff grazed his sheep on those pieces of land. All that the authorities require is that "an ordinary owner of the land, diligent in the protection of his "interests, would have, or must be taken to have, a reasonable "opportunity of becoming aware of that enjoyment": see *Union Lighterage Co.* v. *London Graving Dock Co.*, *per* Romer L.J.[16]

[SINGLETON L.J. An ordinary owner should have a reasonable opportunity of finding out. Was any question addressed to that at the hearing?]

The only owner called was the second plaintiff Jones, who said he knew about the sheepwalks.

[SINGLETON L.J. That really would not affect the question, for he was the owner only from 1941 to 1944. Where is the onus in a matter of this sort? Are you to assume that a normal owner living 15 miles away would know that year after year other people's sheep graze on one little piece of his land?]

It is a question of fact for the judge, depending on whether the enjoyment was open or secret: see Bennett J. in *Lloyds Bank Ld.* v. *Dalton.*[17] Admittedly a right of support is not the same as a sheepwalk, but Gale notes that case and says that, where there is a positive thing like driving sheep, it is easier for a plaintiff to establish his right, for it cannot be said to be secret. All that is needed is to show open enjoyment for 60 years.

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[14] (1864) 4 F. & F. 329, 334.

[15] (1867) L.R. 2 Q.B. 161, 171, 181.

[16] [1902] 2 Ch. 557, 571.

[17] [1942] Ch. 466, 471.

[BIRKETT L.J. I don't think that is enough. You must show knowledge or means of knowledge; and the fact that it was "common knowledge" among tenants does not prove the point at all.]

But it would be laying down a novel doctrine if the person who claims the right had to notify the owner of what everybody in the district must know. Where you have a succession of leases, as the judge finds here, the owner of the servient tenement can take steps to intervene at the end of each tenancy; his knowledge and power to resist would be inferred, and the onus would be on him to show otherwise: see *Bishop* v. *Springett*[18] and *Powers* v. *Bathurst*,[19] where Wightman J. was cited as saying that once you have a presumption of dedication of a right of way the assent of the owner is prima facie to be inferred.

If the court finds 60-years' user, the principle stated by Lord Herschell in *Philipps* v. *Halliday*[20] should be applied, that where there has been long-continued possession in assertion of a right, that right should be presumed to have had a legal origin if such were possible. The judge was entitled to draw the inference from the evidence before him and he drew it in favour of the plaintiff. His conclusions should be accepted.

Mars-Jones in reply. I concede that the question of submission is one of fact. But Mr. Dare says that the letters of protest must have some continuing effect. There is authority that where there is correspondence it is only while that continues that there is no submission. The effect of the last objection would continue for some time, but not for more than one year. I do not accept that the effect of these letters goes beyond August 2, the date of the latest of them. The correct approach is to be found in *Bennison* v. *Cartwright*,[21] *per* Mellor and Blackburn JJ.[22]

As to the claim based on 60-years' user, I challenge the view that the presumption of user as of right from time immemorial is raised if it is shown for 61 years. On the judge's findings on this point I say that there was not such user as to entitle the plaintiff to claim prescription at common law or under the Act. Where private easements or profits are claimed, the authorities show that the onus is always on the plaintiff to prove them, and part of the proof is that the owner of the servient tenement knew or had means of knowing of the user. The cases cited by Mr. Dare do not find room in Halsbury or Gale on Easements because quite separate and different principles apply to the law of acquisition of public rights of way and that of acquisition of private rights. The courts have always been ready to protect public rights after comparatively short proof of continuous use, but they have not shown the same readiness to protect rights claimed by a private individual. The only basis for establishing a private claim by prescription is by presumed grant by the owner of the servient tenement. The proper test is that of Romer L.J. in the *Lighterage* case.[23] The " common knowledge " was that of previous tenants and servants on adjoining farms. But what would draw the owner's attention to the fact that sheep were grazing on that little bit? There was no fence. The law demands knowledge plus power. Here, even if he did know of it, the owner of the servient tenement could not have had power during any of the time from 1889 to 1941 to prevent the enjoyment of this right.

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[18] (1831) 1 L.J.K.B. 13.

[19] (1880) 49 L.J.Ch. 294.

[20] [1891] A.C. 228, 231.

[21] 5 B. & S. 1.

[22] Ibid. 17, 18–19.

[SINGLETON L.J. The finding as to reasonable opportunity was on the claim under the Act?]

Yes. I am not on such safe ground as to the occupation of the servient tenement on the claim under the Act; but if the plaintiff cannot satisfy the common law conditions as to user as of right he cannot establish 60 years indefeasible under the Act, because it must be the same user.

Cur. adv. vult.

November 6. SINGLETON L.J. stated the facts and continued:— It is clear that the plaintiff regarded the land in respect of which the claim is made as part of the Crown wastes. In his amended particulars, dated November 28, 1951, he makes his claim in respect of lands " sometimes described as Crown wastes." It is now clear beyond dispute that the land (the 12½ acres) was included in the conveyance to the defendant and that it belongs to him. Thus the plaintiff claims a right to pasture his sheep on a part of the defendant's land, and in his suit he sought an injunction to prevent the defendant interfering with that alleged right. The claim was at first that the plaintiff was entitled to the right by prescription under the common law, but at the hearing the particulars were further amended to include a claim under the Prescription Act, 1832, and the case was considered by the county court judge on that ground alone.

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[23] [1902] 1 Ch. 466, 469–70.

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[His Lordship then recited the terms of the county court order, indicated that there had been another plaintiff in the action as to whom he need not say anything, and continued:] The defendant appeals against that judgment, and the main contention arises on the amended defence, which reads:

"In the further alternative, such enjoyment has been interrupted for more than one year in that the plaintiffs have submitted to or acquiesced in the enclosing of the said area as aforesaid from about August 9, 1950, until September 28, 1951, when this action was brought."

The finding of the county court judge on this defence is stated in this way: "But the question then arises whether the user was uninterrupted. So far as Mr. Davies is concerned, it was suggested that there was interruption caused by the action of the witness William Roberts in driving some of Mr. Davies' sheep off the land which his sheep grazed, forming part of Hafod. But there was no evidence that Mr. Davies knew of this and, indeed, Mr. Roberts admitted that he had never complained to Mr. Davies that the latter's sheep were trespassing on his land, or ever mentioned the matter to Mr. Davies. Then in regard to both plaintiffs, it was argued that there had been effective interruption of their user by the erection of the fences by the defendant. But this in itself is not sufficient to defeat the plaintiff's claim. The defendant must prove that the plaintiffs submitted to or acquiesced in the interruption for one year after they had notice of it.

"The defendant started erecting the fences in May, 1950. When this came to the knowledge of the plaintiffs they took action. It was not drastic action. They did not pull down the fence or commence an action for trespass. What they did was to consult the National Farmers' Union with a view to getting advice, and then met the defendant and the representative of the union on the site. They hoped to avoid a dispute, but made it clear to the defendant that they objected to his action. Then they instructed solicitors to act on their behalf. The solicitors wrote, on July 6, 1950, to the defendant saying that unless the defendant refrained from further work on the fencing, proceedings would be taken. The defendant continued with the fencing which was completed on August 9, 1950. It is true that proceedings were not initiated until September 28, 1951, but in the meantime protracted correspondence between the solicitors for both parties had taken place, in which the plaintiffs did not either themselves or "through their solicitors abandon their protest against the defendant's action, but continued to assert their rights. I think "that this is sufficient. To negative submission it is not "necessary to bring an action or to remove the obstruction. "(See *Glover* v. *Coleman*.[24]) On the evidence, I hold that "neither of the plaintiffs submitted to or acquiesced in the "interruption."

[His Lordship then read sections 1 and 4 of the Prescription Act, 1832, and continued:] To establish a claim under section 1 of the Prescription Act, the user relied on must have been "without interruption"; and by section 4 the period of years "shall be deemed and taken to be the period next before some "suit or action . . . shall have been . . . brought into question."

The case for the defendant was that there was complete interruption as from the date of the completion of the fence on August 9, 1950; that thereafter nothing was done, said, or written by the plaintiff until the issue of the summons more than one year after the plaintiff had notice; that that interruption must be taken to have been submitted to or acquiesced in by the plaintiff, and that consequently he could not succeed under the Act. There is no evidence to show that there was between August 1, 1950, and September 27, 1951, any protest, verbal or other, against the obstruction caused by the fence erected by the defendant. It is clear that from August 9, 1950, there was complete interruption of the user of the land by the plaintiff's sheep, but it is claimed that it was not submitted to or acquiesced in by the plaintiff for one year. Whether it can be said that there was acquiescence may be doubtful. On the other hand, I find it exceedingly difficult to say that there was not submission to the interruption of user by the plaintiff. He had protested up to August 1, 1950, but no reply was sent to the defendant's solicitors' letter of August 2, 1950, and thereafter nothing by way of protest or complaint was done for almost 14 months, that is, until the issue of the summons. I regard that as submission to the interruption of the user for more than a year and as a bar to the plaintiff succeeding in his claim.

The judge put it in this way: "It is true that proceedings were "not initiated until September 28, 1951, but in the meantime "protracted correspondence between the solicitors for both "parties had taken place, in which the plaintiffs did not either "themselves or through their solicitors abandon their protest

[24] L.R. 10 C.P. 108.

"against the defendant's action, but continued to assert their "rights. I think that this is sufficient. To negative submission "it is not necessary to bring an action or to remove the obstruc-"tion. (See *Glover* v. *Coleman*.[24]) On the evidence, I hold that "neither of the plaintiffs submitted to or acquiesced in the "interruption."

I am not sure that the words "in the meantime" can be regarded as strictly accurate, for the correspondence ceased on August 2, 1950, and there was no protest after that date until the issue of the summons. The view which I take of the position is that if there is no protest, no objection, or no complaint, for a year during which there is interruption of user, there is at least submission to the interruption. I cannot accept the argument put before us that the protest made in the correspondence would be effective for some time at least, and that consequently time would not run against the plaintiff. The acceptance of any such argument would mean the substitution of a reasonable time for the period of one year in section 4 of the Act; that would never do. I agree that it is a question of fact which has to be decided, and the question is: Was there submission to the interruption for one year? That question, I consider, must be answered in the affirmative, though there were protests and objections beforehand. I do not obtain help from anything that was said in *Glover* v. *Coleman*,[24] the decision in which was that a party was not submitting to, or acquiescing in, the interruption, if he complained of and protested against it, so as to show the party causing the interruption that he really did not submit to or acquiesce in it. The question before us did not arise in that case; it could not, having regard to the facts [25] (and I draw attention to the argument,[26] from which it appears that it was assumed that the owner of the premises had a right to sue, and that he only knew of the obstruction six months before action brought).

I gain more help from *Bennison* v. *Cartwright*.[27] It is unnecessary to go into the facts of that case, which was heard before Blackburn J. It was a claim for trespass. The trespass for which the action was brought was committed on February 3, 1863, and the writ was issued on the following day:[28] "The "judge left to the jury the question whether the defendant "had submitted to or acquiesced in the interruption for one

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[24] L.R. 10 C.P. 108.
[25] Ibid. 109.
[26] Ibid. 111.
[27] 5 B. & S. 1.
[28] Ibid. 2.

"year within the meaning of statute 2 & 3 Wm. 4, c. 71, s. 4, "and they said that he had not, and found for him on both "pleas. *Held*, *per* Crompton, Blackburn and Mellor JJ. (1) "that the question was properly left to the jury, as an interruption might be shown to have been not submitted to or "acquiesced in within the meaning of statute 2 & 3 Wm. 4, "c. 71, s. 4, though no suit or action had been brought."

Crompton J. said[29]: "The more important question is "whether there has been a non-acquiescence by the defendant in "the interruption of his easement. That depends on section 4 "of statute 2 & 3 Wm. 4, c. 71: and upon reading the words of "that section I have no doubt that this was a matter for the "jury and not one on which the judge would have been "authorized to stop the case. It was argued by Mr. Temple "and Mr. Jones that there was acquiescence unless some suit or "action was brought for the act or other matter which constituted the interruption. But there is nothing in the statute to "warrant that construction and their argument has not convinced me that it is right. They lay down as the ground of "their argument, what indeed must now be taken to be law, that "the party claiming the right must show that it has been "enjoyed continuously up to the time of the commencement of "the suit or action. One would have thought that for justifying "an alleged trespass it would be necessary to show a right to do "the act at the time of committing it. And the notion of an "inchoate right being perfected at the time of the commencement of the action is very strange; probably it was suggested "by the words in the first clause of section 4—each of the "periods shall be deemed to be the period 'next before some suit "'or action' wherein the claim shall be brought into question."

Mellor J. said[30]: "When a statute for shortening the time of "prescription, after, in aid of that attempt, prescribing the "period during which the right must be enjoyed without interruption, goes on to say that no act or other matter shall be "deemed to be an interruption 'unless submitted to or "'acquiesced in for one year' after the party interrupted shall "have notice thereof, the natural and obvious meaning of the "words is that an obstruction shall not be effectual unless the "party shall allow it to continue for one year, without any act "on his part to show that he resists it. In the present case "correspondence and negotiation upon the matter show that the

[29] 5 B. & S. 1, 15.

[30] Ibid. 17.

"question was more properly a question for the jury than the "judge; and the jury were warranted in finding that the interruption was not submitted to, or acquiesced in, for a year, "within the meaning of the statute."

Blackburn J. said[31]: "The first point turns on the construction of the 2nd and 4th sections of the Prescription Act, "2 & 3 Wm. 4, c. 71. Where a claim of an easement is made "by reason of its having been enjoyed for 20 or 40 years "three things must concur:—First, an enjoyment by a person "claiming right thereto; secondly, an enjoyment without interruption; and, thirdly, it must have been an enjoyment for the "full period of 20 or 40 years. On the construction of the first "clause in section 4, Mr. Temple and Mr. Jones say the cases "have decided that the period of enjoyment must expire at the "commencement of some suit or action; and we cannot help "that apparent absurdity, because the words of the Act are "express. But, construing the words of the second clause in "that section according in their plain meaning, I am unable to "see how it follows that an interruption is acquiesced in for a "year unless a suit or action be brought within that time. In "the present case I thought there was not an acquiescence in the "obstruction during the time of the correspondence between the "attorneys of the parties, but I left the question to the jury, and "they found that there was not. Excluding that time the "obstruction was not submitted to, or acquiesced in, for one "year, whether we reckon the time to the act of the alleged "trespass or to the issuing of the writ; though I think that, if "the question arose, it would turn rather upon when the act was "done than upon when the writ was issued. Therefore on that "point I think the direction was right, and the finding of the "jury right."

The words "excluding that time the obstruction was not submitted to, or acquiesced in, for one year" are important. Protests by correspondence or otherwise may well show that a party is not submitting or not acquiescing; excluding the period during which there were protests, there is in the present case a period of more than one year in which nothing whatever was done. I regard this as fatal to the plaintiff's claim under the statute.

Mr. Dare, for the plaintiff, submitted that the judge's findings were sufficient to entitle him to rely on prescription at common law, and that he was not limited to a claim under the Prescription Act. The claim was originally drawn in this way, and was amended at the trial to cover a claim under section 1 of the Act, and the whole contest seems to have been under the Act.

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[31] 5 B. & S. 1, 18.

To that submission Mr. Mars-Jones made answer: (1) there is no proof that the owner of the servient tenement had knowledge or means of knowledge that a small portion of his land was being used by the plaintiff's sheep. The land now owned and occupied by the defendant had been let for most of the 60 years. (2) In any event, the owner had had no power to stop that user. He relied on the opinion of Fry J., accepted in the House of Lords in *Dalton* v. *Angus*,[32] and he drew our attention to Gale on Easements, 12th ed., pp. 221–222, where the authorities are conveniently set out.

Mr. Dare cited the judgment of Bennett J. in *Lloyds Bank Ld.* v. *Dalton*,[33] and he placed particular reliance on the words of Romer L.J. there cited.[34] He submitted that the onus was on the defendant, and for that proposition he relied on the words of Lord Herschell in *Philipps* v. *Halliday*[35] and on *Powers* v. *Bathurst*.[36]

Mr. Mars-Jones's reply to that was that there was no case showing that the onus was on the defendant where the right claimed was of a private nature. That appears to be right.

I am not disposed to decide this appeal in favour of the plaintiff on the claim under the common law, a claim which was not really considered by the judge. I do not think that it is right to say that, in the circumstances of this case, the onus is on the defendant. The right test to adopt is that stated by Romer L.J. in *Union Lighterage Co.* v. *London Graving Dock Co.*,[37] where he said[38]: "That being so, the only remaining question is "whether an easement has been acquired as against the plaintiffs "under the Prescription Act. Now, on principle, it appears to "me that a prescriptive right to an easement over a man's land "should only be acquired when the enjoyment has been open— "that is to say, of such a character that an ordinary owner of "the land, diligent in the protection of his interests, would have, "or must be taken to have, a reasonable opportunity of becoming "aware of that enjoyment. And I think on the balance of "authority that this principle has been recognized as the law, "and ought to be followed by us."

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[32] 6 App.Cas. 740.
[33] [1942] Ch. 466.
[34] Ibid. 470–1.
[35] [1891] A.C. 228, 231.
[36] 49 L.J.Ch. 294.
[37] [1902] 2 Ch. 557.
[38] Ibid. 570.

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v.
Du Paver.

Singleton L.J.

We are considering a small piece of land in hill country in a remote part of Wales where there is, or until lately there was, little or no fencing. There must always be some give and take between neighbouring farmers in such circumstances. The owner of Hafod Ysbytty did not live in the neighbourhood; yet, if the claim of the plaintiff is to succeed, the defendant is virtually deprived of the use of this piece of land, for the plaintiff can graze on it an unstated number of sheep at any time of the year. And the evidence of Mr. William Roberts, a former tenant of the defendant's farm, that when he saw other people's sheep on this land he drove them off, should not be overlooked.

I do not consider that the plaintiff established his claim under the common law, and, in my opinion, this appeal should be allowed, and the judgment of the county court judge in favour of the plaintiff should be set aside.

Birkett L.J. stated the facts and continued:—The defendant pleaded that if the plaintiff had enjoyed any such rights as he alleged, they had not been enjoyed by him or his predecessors in title for 30 years before the action was brought, or for any other period required by law; that such enjoyment had been a secret enjoyment without knowledge of the defendant or his predecessor in title; and that the enjoyment of the plaintiff had been interrupted for more than one year in that the plaintiff had submitted to, or acquiesced in, the enclosing of the land from about August 9, 1950, until September 28, 1951.

When the case for the plaintiff was opened before the judge, his counsel referred to section 1 of the Prescription Act, 1832, and said that the plaintiff claimed that the user of the land on which he relied had existed for 60 years. At the adjourned hearing the claim was amended to allow section 1 of the Act of 1832 to be pleaded, and the judge said that it was on this basis that the hearing was conducted. The sections of the Act must be kept clearly in mind, and in particular section 4.

The main point of this appeal was that the user of the plaintiff had been interrupted before action brought from about August 9, 1950, to September 27, 1951, and that the plaintiff had submitted to, or acquiesced in, that interruption. It is clear that whether the claim is for the shorter or the longer period set out in the Act, the user must be proved for the period computed next before the commencement of the action in which the claim is contested.

The judge, on the evidence before him, came to the conclusion that the plaintiff had proved that he and his predecessors in title had exercised the disputed rights of pasturage for over 60 years, and that the user was nec vi, nec clam, nec precario. He further held that the plaintiff had not submitted to, or acquiesced in, the interruption for one year after he had notice of it. On the facts of the case, it is clear that there was an interruption for one year after the plaintiff had notice of the interruption. The important question is: Did he submit to it, or acquiesce in it, for one year after he had notice?

The judge said that he had not found it easy to arrive at a conclusion, and I share his view. The first strong fact is that for a full year after the plaintiff had notice of the interruption nothing overt was done by him or his solicitors. The fencing seems to have been finished by August 9, 1950, and the first protest after that date was the issue of the summons dated September 27, 1951. The question, easy to state but difficult to answer, is: Is the lapse of that 13 months to be taken as conclusive evidence of "submission to, or acquiescence in," the admitted interruption? After all, "submission to or acquiescence in" is a state of mind evidenced by the conduct of the parties, and I am of opinion that it was a question of fact for the judge to decide on all the facts of the case, and that it was not to be decided merely by saying that there was in fact a period of a year in which nothing was done, without considering all the surrounding circumstances. This is not a case under the Statute of Limitations. It is not a case where the words "a reasonable time in all the circumstances of the case" may be substituted for the words of the statute. It is a case where a judge must decide as a question of fact whether there has been submission to, or acquiescence in, the interruption for one year after the party interrupted had notice of the interruption.

On July 6, 1950, the solicitors for the plaintiff threatened proceedings against the defendant unless the interruption was removed; on July 28 they renewed their protest; on August 1 they stated that they had instructed the plaintiff to take such steps as he thought necessary to prevent further infringement; and then nothing outwardly was done until September 27, 1951. I am of opinion that, following the decision in *Bennison* v. *Cartwright*,[39] it is a question of fact whether these circumstances show a submission to, or acquiescence in, the interruption for one year, despite the fact that one year had admittedly gone by during which no outward protest was made or any other action taken. The fact that there was a complete year in which the plaintiff did nothing is some evidence that he had submitted to, or acquiesced in, the interruption; but the fact also that he protested most strongly up to August, 1950, and then actually took proceedings in September, 1951, is some evidence that he did not. It was a question of fact for the judge.

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[39] 5 B. & S. 1.

I can quite understand the view being taken that the letter of August 1, 1950, or the completion of the fence by August 9, 1950, were not dates from which automatically the statutory period of one year was to run. The fact that action was taken in September, 1951, shows that there was not acquiescence in the interruption, and the judge was quite entitled to take the view that, although it could not be denied that there had been a period of one year in which nothing was done by the plaintiff or his advisers, nevertheless there had not been acquiescence for that year or submission to interruption for that year when the full history of the matter was considered. The judge considered *Glover* v. *Coleman*,[40] and his reference to "but in the meantime, "protracted correspondence between the solicitors for both "parties had taken place" was not a mistake on his part, as was suggested in argument, but was a reference to the correspondence in July and August, 1950, which, in his view, had an important bearing on the question of fact he had to decide. The passage reads: "The solicitors wrote on July 6, 1950, to the defendant "saying that unless the defendant refrained from further work "on the fencing, proceedings would be taken."

It could be no other, for the judge was writing a considered judgment with the correspondence before him, and the words "in the meantime." though not strictly true as a matter of English, must plainly mean "before the date of September 28, "1951." This being a question of fact, I am therefore, not disposed to decide this appeal on the ground that that finding of fact ought to be disturbed.

Difficult as I think the question I have just discussed to be, there is another submission made by the defendant that I find more difficult still, and it is set out in the notice of appeal. The claim made by the plaintiff in this case must be "as of right," as would appear from section 5 of the Act, and the observations of Baron Parke in *Bright* v. *Walker*.[41] This would seem to involve some knowledge, or means of knowledge, on the part of the servient owner against whom the right is claimed, and reference may be made to *Dalton* v. *Angus*[42] and *Union Lighterage Co.* v. *London Graving Dock Co.*[43]

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[40] L.R. 10 C.P. 108.

[41] (1834) 3 L.J.Ex. 250.

The judge found that during the whole of the period in which the plaintiff had claimed to exercise his rights of pasturage on the land in question there had been a sitting tenant at the defendant's farm. The father of the second plaintiff, Mr. Jones, had been tenant for 40 or 50 years until his death in 1929. Then the plaintiff Jones was tenant from 1929 to 1941, when he became owner with his wife. In 1944 they sold the farm to Sontag and in September, 1949, the defendant became the owner. In 1946 one William Roberts was the tenant under Sontag, and he gave evidence that he drove away the plaintiff's sheep whenever he found them there, but the judge found that the plaintiff was in ignorance of that.

The two findings made by the judge, as set out in his judgment, are: "On this point I find: (1) that it was common "knowledge that the plaintiffs were grazing their cattle on these "pieces of land; (2) that even though the owner of the servient "tenement might not have been able to take action in the courts "he could have acted in such a way as to show that he did not "acquiesce in what the plaintiffs were doing."

I think that there can be no doubt that the question of knowledge in the servient owner is a question of fact for the judge. There is equally no doubt that in this case the judge has purported to find that the servient owner had knowledge, or the means of knowledge, by his use of the phrase, "It was common "knowledge that the plaintiff was grazing his cattle on these "pieces of land." He also purports to find that the owner of the servient tenement, having the requisite knowledge, could have acted in such a way as to show that he did not acquiesce in what the plaintiff was doing.

I think that the important question here is: Was there any evidence before the judge on which he could so find? Is it shown that the common knowledge included the servient owner during the relevant period? The evidence given in the case is before us, and it is difficult to say that there is any evidence that the common knowledge spoken of by the judge extended to the servient owner. Nothing is said as to the steps which the servient owner could have taken, and those steps would depend on what was the state of the knowledge brought home to the servient owner. If the proof of the knowledge of the servient owner lies on the plaintiff, I am of opinion that he has failed to discharge it, and I see no evidence on which the judge could find that the common knowledge extended to the servient owner, or any evidence that the servient owner had the means of knowledge. It is on this ground that I would allow the appeal, for the claim "as of right" cannot in these circumstances be established. Having formed this conclusion, I do not feel it necessary to consider the claim at common law, for the same objection, in my opinion, would be fatal.

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[42] 6 App.Cas. 740.

[43] [1902] 2 Ch. 557, 568–9.

MORRIS L.J. The first point raised by the defendant is that there was a fatal interruption of the enjoyment by the plaintiff of his alleged right of pasturage. In the notice of appeal this contention is formulated on the basis that there was no evidence that Mr. Davies "had asserted his alleged rights or protested at "the interruption of his alleged rights of pasturage" between August 1, 1950, and September 28, 1951, and "that accordingly "the judge was wrong in law in holding that the plaintiff Davies "did not acquiesce in, or submit to, such interruption which had "continued for more than one year." This language raises the question as to the meaning of an "assertion of rights or of a "protest." But the real question is not whether there was an assertion of rights or a protest during some period, but whether there was in this case a submission or an acquiescence. It is provided by the Prescription Act, 1832, that no act or other matter is deemed to be an interruption within the meaning of the Act unless submitted to, or acquiesced in, for one year after the party interrupted has notice of the interruption and of the person making it or authorizing it to be made.

/There is no doubt that there was an actual interruption for more than a year before September 27, 1951. The question is whether there was acquiescence in such interruption or submission to it lasting for one year. This is, in my judgment, a question of fact. If a case were being tried with a jury it would be a question for the jury to determine: see *Bennison* v. *Cartwright*.[44] In *Glover* v. *Coleman*[45] Grove J. said[46]: "Then we come to the words 'submitted to or acquiesced in.' Now, the statute does "not prescribe any particular mode of resistance. The statute

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[44] 5 B. & S. 1.

[45] L.R. 10 C.P. 108.

[46] Ibid. 121.

"does not, indeed, use the word 'resistance,' although Mr. "Bosanquet in the course of his argument used it as opposed to "submission or acquiescence. There being, then, nothing in the "statute to guide us as to what shall be the nature of the submission or acquiescence, that must necessarily be a question "of fact—has the party interrupted, by his words or conduct, "submitted to or acquiesced in the interruption, or has he resisted "or protested against it? There are, no doubt, various modes "of resistance or of expressing dissatisfaction."

The plaintiff noticed in May, 1950, that the defendant was putting up the fence. He (the plaintiff) consulted the National Farmers' Union, and with the secretary of that body saw the defendant on the site and told him that they objected to the fence. Then solicitors were consulted, and on July 6, 1950, the letter was written to which my Lord has referred. The reply to that letter was dated July 10. Certain letters then passed, from which I will only read brief extracts. On July 27 the defendant's solicitors wrote that unless sheep were, within the next seven days, taken away, there would be the necessity to move them off the land. Then the letter went on to say: "He also complains "that your client, Mr. Davies, has been seen crossing Hafod "Ysbytty lands in the company of another man, presumably a "surveyor. . . ."

Then, on July 28, the plaintiff's solicitors wrote: ". . . The "position our clients take up is that from time immemorial there "have been certain grazing rights and that they have done "nothing except in exercise of those rights. . . ." Then there is a reference to the surveyor. Then in the letter of July 31 is this sentence: ". . . We have, in our previous letter, made it "perfectly plain that your client's claims to grazing rights are "strongly denied by our client." In the letter of August 1 is this sentence: "We have today heard from our clients, and we "understand that your client's acts of fencing are interfering with "our client's rights of pasture, and we have instructed our clients "to take such steps as they think necessary to prevent further "infringements. . . ." Then followed the letter of August 2 to which my Lord has referred.

The fence was completed on August 9. Could it be said that the plaintiff had submitted to, or acquiesced in, the existence of the fence by that date? Having regard to the events that had happened, and to the correspondence, I would have thought, had it been for me to decide this question of fact, that the answer would be in the negative. The parties were breathing fury on each side of a newly erected fence. Could it be said that the challenging protests of the plaintiff must, as the August days passed, be deemed to have signified nothing, and that his former claims and assertions should be regarded as supplanted by submission and acquiescence? As time went by, it might well be that silence and inaction could be interpreted as submission or acquiescence. But the date when submission or acquiescence begins must be determined as a question of fact, having regard to all the circumstances. Had there been a beginning by January 1, 1951, or by December 1, 1950, or by November 1, 1950? These are all questions of fact. Unless it is held that there was submission or acquiescence by September 27, 1950, there would not be a period of one year. The judge referred to *Glover* v. *Coleman*[47] and stated: " On the evidence I hold that neither of the plaintiffs " submitted to or acquiesced in the interruption." This was a finding of fact which the judge was, in my view, entitled to make, and accordingly I consider that the first submission fails.

The second and only remaining effective submission of the defendant was expressed in the notice of appeal in the following words: " That the judge was wrong in law and misdirected him- " self in holding that the fact that the servient tenement was in " the occupation of a tenant throughout the period during which " the plaintiff Davies and his predecessors in occupation of the " dominant tenement were alleged to have exercised the said " alleged rights up to 1941, and from 1946 to 1950 did not prevent " the plaintiff Davies from establishing his alleged rights under " the Prescription Act."

It is not without significance that the claim as first advanced was that the defendant had wrongfully erected fences on land forming part of the Crown wastes over which it was claimed that the plaintiff had exclusive rights of pasturage. The plaintiff claimed such rights as appurtenant to his ownership and occupation of the farm and lands known as Tryfal. He claimed that the erection of the fences prevented him from enjoying his rights of pasturage. There was a second plaintiff, Mr. Jones, who was the owner and occupier of a farm and lands known as Teiliau Mawr. He also claimed that he enjoyed exclusive rights of pasturage over certain other parts of the Crown wastes, and asserted that the defendant had wrongfully erected fences on the part of the Crown wastes over which he had his rights of pasturage. To those claims the defendant made answer that the fences which he had erected were not on the Crown wastes at all, but were on his own land. He said that they were along the boundary of his farm and lands situate at and known as Hafod Ysbytty—otherwise known as Gamallt.

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[47] L.R. 10 C.P. 108.

The plaintiffs, Mr. Davies and Mr. Jones, later amended their claim and referred to the rights which they claimed as being "rights of common of pasture over lands sometimes described as "Crown waste." In their amended claims they set out that their rights were in the alternative claimed "by prescription "and/or the Prescription Act, 1832, s. 1, the plaintiffs having "enjoyed the said rights as of right and without interruption for "60 years before this action."

The evidence showed that the father of the plaintiff Jones had been tenant of Hafod Ysbytty for some 40 to 45 years when he died in 1929. At such date Mrs. Casson was the owner. She died while the plaintiff Jones was tenant. Mr. Casson, her late husband, had previously been the owner. The plaintiff Jones remained as tenant of Hafod Ysbytty after 1929, and in 1941, together with his wife, he became by purchase the owner. In 1944 one Sontag in turn purchased the farm. In 1946 Mr. William Roberts became tenant of the farm (but not of the house itself). It was said that he drove away the plaintiff Davies' sheep daily. The judge held, however, that the plaintiff Davies was not aware of that. In September, 1949, the defendant purchased Hafod Ysbytty and thereafter occupied it.

As the case proceeded it became clear that the defendant had erected his fences on his own land. There is now no dispute as to this. The contest became one as to whether the plaintiffs could prove that they had acquired prescriptive rights over the defendant's land, and the trial was conducted, as the judge recited in his judgment, on the basis that the issue was whether the plaintiffs had proved a user for 60 years which enabled them to rely on the Prescription Act.

The claim of the plaintiff Jones failed for reasons which it is not necessary now to state, and no appeal by him is before us. The plaintiff Davies seeks to hold his judgment by relying on prescription at common law as well as under the statute.

In his careful judgment the judge records his finding that Davies and his predecessors at Tryfal exercised rights of pasturage for over 60 years. But during most of the period there was a sitting tenant at Hafod Ysbytty. In fact, from 1929 to 1941 the sitting tenant was the co-plaintiff Jones; for some 40 to 45 years before 1929 the tenant was the father of

Mr. Jones. Before Mr. Davies could establish a claim based on prescription the evidence would have to show that the owner of the servient tenement had knowledge of what was happening, or as an ordinary owner must be taken to have had reasonable opportunity of knowledge, and that, having power to prevent it, he did not intervene. (See the opinion of Fry J. in *Dalton* v. *Angus*.[48]) In *Sturges* v. *Bridgman*[49] Thesiger L.J. said[50]: "Consent or acquiescence of the owner of the servient tenement "lies at the root of prescription, and of the fiction of a lost "grant, and hence the acts or user, which go to the proof of "either the one or the other, must be, in the language of the "civil law, nec vi, nec clam, nec precario; for a man cannot, "as a general rule, be said to consent to or acquiesce in the "acquisition by his neighbour of an easement through an enjoy-"ment of which he has no knowledge, actual or constructive, or "which he contests and endeavours to interrupt, or which he "temporarily licenses. It is a mere extension of the same "notion, or rather it is a principle into which by strict analysis "it may be resolved, to hold, that an enjoyment which a man "cannot prevent raises no presumption of consent or acquies-"cence."

The judge found that it was common knowledge that the plaintiffs were grazing their cattle on the pieces of land in question. But this invites the inquiry—common knowledge among whom ? Local hill farmers might well be able to identify which sheep and whose sheep were on particular land at any particular time, but I do not consider that the evidence supported the view that the owner of the land, who lived some miles away, was to be included within the group of those who shared this common knowledge.

The judge further held that "even though the owner of "the servient tenement might not have been able to take action "in the courts, he could have acted in such a way as to show "that he did not acquiesce in what the plaintiffs were doing."

With every respect, I do not find myself able to share this view. If the owner of Hafod Ysbytty had for some reason known that there were certain sheep belonging to the owner of Tryfal on the land in the occupation of the tenant of Hafod Ysbytty it does not follow that he would have known that any right was being asserted, or that he would necessarily think that it was other than as a result of some arrangement with the tenant.

[48] 6 App.Cas. 740, 773.

[49] 11 Ch.D. 852.

[50] Ibid. 863.

I do not consider that the evidence supported a finding of knowledge in the owner of Hafod Ysbytty or showed that there was any reason why, in the ordinary course of things, he should have known.

On this part of the case, therefore, I feel impelled to the conclusion that the claim of the plaintiff Davies was not made out, and in consequence that the appeal succeeds.

Appeal allowed.

Solicitors: *Hall, Clark, Goldhawk and Jutsum & Co. for Gwyndaf-Williams and Roberts, Portmadoc; Jaques & Co. for David Thomas, Williamson & Co., Llanrwst.*

M. M. H.

MURRAY BULL & CO. LD. *v.* MURRAY.

[1951 M. 2976.]

1952
Nov. 20, 21.
McNair J.

Landlord and Tenant—Rent restriction—Tenancy—Company's lease of flat to managing director for seven years or earlier termination of managing directorship—Expiry of lease—Holding over by director—Statutory or contractual tenancy—Director's resignation—Correspondence between company and director about continued occupancy of flat—Company's willingness for former director to continue occupation as a "quarterly tenant" on terms that he should not be a controlled tenant—Licence or tenancy.

In 1929 the plaintiff company, which carried on business as research and analytical chemists, appointed the defendant to be managing director on the terms of a seven years' service agreement; and when this ran out by effluxion of time in 1936 the defendant remained the managing director without there being a new agreement. In June, 1939, the company granted him a lease of a flat in the company's premises. The flat had an independent access to the street and also direct access to the company's offices and laboratory on the first floor of the premises. Its rateable value was £64 and the defendant took possession on terms that his lease should extend for seven years or until the earlier termination of his post as managing director. When that agreement ran out in June, 1946, the defendant remained in possession. His resignation as managing director was later accepted by the company to take effect from August, 1950, on terms (amongst others) that he would vacate the flat by December 31, 1950. In correspondence thereafter the company agreed to the defendant's request that he should continue as a "quarterly tenant" after December 31, 1950, under conditions which should not establish him as a controlled tenant and on terms that he would vacate the flat when he found other accommodation or when the company required to use the flat. His offer to pay an increased rent was refused by the company.

In an action by the company to recover possession on the ground that the defendant was a mere licensee of the flat, the defendant claimed to be protected by the Rent Restriction Acts:—

Held (1) that when the defendant's lease expired in June, 1946, he held over on the same terms as a contractual tenant and did not become a statutory tenant; (2) that in 1950 after his resignation as managing director the common intention of the parties as shown by the correspondence was that the defendant should be granted a mere personal privilege with no interest in the premises, and the proper inference to be drawn was that he became a mere licensee; and (3) that accordingly, the company was entitled to an order for possession.

Errington v. *Errington* [1952] 1 K.B. 290 and *Marcroft Wagons Ld.* v. *Smith* [1951] 2 K.B. 496 applied.

ACTION.

In 1929 the plaintiff company was formed to carry on the business of consulting, research and analytical chemists, and on April 11 of that year the defendant Humphrey Desmond Murray became the managing director under the terms of a service agreement which ran for seven years. That agreement, which contained no provision requiring the defendant to live in any particular place, ran out by effluxion of time on April 11, 1936, and the defendant carried on as managing director without any fresh agreement. In 1939 the company took a lease, still subsisting, of premises at 20 Kinnerton Street, Knightsbridge, which consisted of some laboratories on the ground floor, the board room, offices and another laboratory on the first floor, and on the second floor a flat which had an independent means of access from the street but also direct access by means of a staircase to the offices on the first floor.

The defendant in June, 1939, moved into the flat as a tenant on terms recorded in the following words in a minute of a board meeting held on May 25, 1939: "It was agreed that" the defendant "should be granted a lease of the flat for a period of seven "years or until the termination of his managing directorship, "whichever is the shorter, at a yearly rental of £90 inclusive of "rates, plus £20 per annum for hot water, provided that the "company shall have the right to terminate the lease in the event "of selling or disposing of the premises." That minute was subsequently signed by the defendant, no formal lease ever being drawn up. The rateable value of the flat was £64. When in June, 1946, the tenancy agreement ran out by effluxion of time, the defendant continued in possession.

On July 10, 1950, the defendant gave the company formal notice of his intention to relinquish his post as managing director; and on July 21 the company through their chairman informed the defendant that his notice had been accepted, to take effect as from August 31, 1950, and that he would have to vacate the flat on December 31, 1950. On August 25, 1950, the defendant wrote to the company inquiring whether he could continue as a quarterly tenant of the flat at the end of December at an economic rental under conditions which did not establish him as a controlled tenant. The company's chairman wrote in a letter of September 5, 1950, that he would meet the defendant's suggestion as regarded his remaining a quarterly tenant after the end of December, and continued: ". . . you will appreciate that the company " may need the flat in the course of the coming months and " naturally I know I can rely on you to vacate the premises when " they are required," to which the defendant replied on September 28: " I am glad to know that I may remain as quarterly " tenant . . . until I find a house or until the flat is required by " the company. I do not wish for any preferential treatment and " I would suggest that, as from December, I should pay a rental " assessed by a local agent as reasonable. At present I pay £120 " a year and I should think that a fair rental today would be " nearer £250."

On October 4, 1950, the chairman wrote: " I have considered " your offer to pay an increased rent—but as it has been agreed " that you remain a tenant on a quarterly basis and in view of " the fact that the company may require the premises in the not " too distant future, I wish the rent now paid by you to stand." The defendant continued in possession of the premises, and on March 27, 1951, the new managing director wrote informing him that the company required vacant possession of the flat by June 30, 1951. The defendant refused to yield up possession.

The company brought an action for possession of the flat, and claimed damages for trespass. It was alleged by the company that in the circumstances the defendant was at all material times a mere licensee. The defendant claimed to be protected from an order for possession by the Rent Restriction Acts. It was alleged on his behalf that immediately before the termination of his managing directorship he became a statutory tenant and that such statutory tenancy had never been terminated by either of the two methods known to the law, namely, by his giving up possession or by his having an order for possession made against him; and alternatively that if his tenancy up to the termination of his managing directorship was a contractual and not a statutory one, that contractual tenancy continued subject to the protection of the Rent Acts, and was never replaced by a mere licence.

Alan R. Campbell and *P. A. Bruce* for the plaintiff company.
M. O'Connell Stranders for the defendant.

McNAIR J. This is a claim by the plaintiff company, Murray Bull & Co. Ld., who carry on business as consulting research and analytical chemists, against the defendant, Humphrey Desmond Murray, who was formerly the company's managing director, for possession of the flat, No. 20A Kinnerton Street, Knightsbridge, of which the defendant originally became the tenant from the company whilst occupying the position of managing director. The rateable value of this flat at all material times was £64 per annum, and accordingly the defendant claims that he is protected against the making of an order for possession against him by the provisions of the Rent Restriction Acts, notwithstanding the fact that when he continued in the flat after the termination of his managing directorship he agreed in clear terms that the continuation of his occupancy should, to quote the language of his letter, be "under conditions which do not establish me as a controlled "tenant."

The main contention advanced on behalf of the plaintiffs was that in the circumstances the defendant was at the material times a mere licensee, to which contention the defendant by his counsel made two main answers: first, that immediately before the termination of his managing directorship the defendant became a statutory tenant and that his statutory tenancy was never terminated by any of the two modes known to the law, that is, either by his giving up possession or having an order for possession made against him; and alternatively, that if his tenancy up to the termination of his managing directorship was a contractual tenancy and not a statutory tenancy, that contractual tenancy continued subject to the protection of the Rent Acts, and was never replaced by a mere licence.

[His Lordship stated the facts and continued:] The first question is whether in June, 1946, when the defendant held over he became a statutory tenant or a contractual tenant. It is argued by counsel for the defendant, on the basis of the decision in *Morrison* v. *Jacobs*,[1] that whenever there is a holding over at the end of a contractual tenancy of premises which by reason of their low rental value are within the Rent Acts, a statutory tenancy is created, and certain passages in the judgments of Scott and Mackinnon L.JJ. in that case are relied on in support of that proposition.

I do not so read those judgments. It seems to me that what the Court of Appeal were there saying was that it was a matter of inference from the surrounding facts. The court had to decide what was the correct inference in the circumstances. When the relationship of the parties is merely that of landlord and tenant, the inference is easy to draw (and in most cases would be inevitable) that on a holding over after the expiration of a lease by effluxion of time, a statutory tenancy would be created. But here all the facts point the other way. The relationship of the parties fundamentally was that of company as employer and defendant as managing director under the service agreement. It is plain to my mind that if the defendant continues on in the terms of the minute, the company would never contemplate letting the flat with its access to the offices below except to a person who had a right to have access to those offices. Furthermore, if the true inference is that on the expiration of his written service agreement the defendant held over on the terms of his service agreement, it seems to me that the correct inference also is that when his written tenancy agreement ran out by effluxion of time he held over on the same terms as a contractual tenant, and I so find.

It is convenient, perhaps, at this stage, if I consider one contention raised (but not strongly relied on) by the plaintiffs, that the defendant's occupancy was a service occupancy. I do not accept that contention. As I have already indicated, it appears to me to be plain that the defendant was never required by the terms of his service agreement to live in this flat, although it was no doubt convenient for both parties that he should do so.

So the matter rested until July 10, 1950, when the defendant, having been approached by another company, the Ozalid Company, for employment on a full-time basis with that company, gave the plaintiffs formal notice of his intention to relinquish his post as managing director. [His Lordship read the correspondence above set out and continued:] Notwithstanding the letter written by the new managing director on March 27, 1951, although the defendant had said that he desired to stay on on terms which did not establish him as a controlled tenant, he is taking up the position that he is protected by the Rent Acts and has refused to yield up possession.

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[1] [1945] K.B. 577.

The question is what is the nature of the arrangements concerning the continued occupancy after December 31, 1950, as appearing from those four letters. The defendant relies, and relies strongly, on the use in those letters of the phrases "quarterly tenancy" and "quarterly tenant" and on the fact that when rent was paid—at any rate till this dispute arose—it was invoiced to the defendant as three-monthly rent of the flat at so much per month, and a receipt was given him in similar terms.

I propose, however, in this matter to apply a test which was laid down by Denning L.J. in *Errington* v. *Errington*,[2] where, after considering the line of cases dealing with the difficult and vexed question of licensee or tenant, he said[3]. "The result of all these cases is that, although a person who is let into exclusive possession is prima facie to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only."

I was also referred in the same connexion to *Marcroft Wagons Ld.* v. *Smith*,[4] and in particular to Denning L.J.'s judgment where he made these observations[5]: "In these circumstances, it is no longer proper for the courts to infer a tenancy at will, or a weekly tenancy as they would previously have done from the mere acceptance of rent. They should only infer a new tenancy when the facts truly warrant it. The test to be applied in Rent Restriction Acts cases is the same test as that laid down by Lord Mansfield in cases of holding over: 'The question therefore is, quo animo the rent was received, and what the real intention of both parties was?'"

In the circumstances of the present case, and on the proper construction of the documents which I have read, I think that it is plain, applying those tests, that both parties intended that the relationship should be that of licensee and no more, though they may not have used that precise term or even have had that precise term in mind. The primary consideration on both sides was that the defendant, as occupant of that flat, should not be a controlled tenant. I think it is clear that their common intention was that the defendant as the occupier should, to use the language of Denning L.J., be granted a mere personal privilege with no interest in the premises. In reaching that conclusion I rely particularly on the letter of August 25, from the defendant, and Mr. Dawborn's reply of September 5.

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[2] [1952] 1 K.B. 290.
[3] Ibid. 298.
[4] [1951] 2 K.B. 496.
[5] Ibid. 506.

In this case there was in my judgment nothing more than a friendly arrangement between the company and its former managing director that he should have the use of these premises, so long as the company did not need them, under conditions which did not establish him as a controlled tenant.

In view of that conclusion of fact it is not necessary for me to express any final view on the validity of the submission by counsel on behalf of the defendant that *Foster* v. *Robinson* [6] is no authority for the proposition, which was advanced by counsel on behalf of the plaintiffs, that even if the tenancy existing before December 31, 1950, were a statutory tenancy, it would still be open for this court to treat the subsequent arrangement as that of a mere licensee. But as the matter has been argued it is right that I should express the provisional view that it seems to me that there is a great deal to be said for the view that the true statutory tenancy can be brought to an end only by the actual giving up of possession or its equivalent, or by an order for possession. For my part—though I express the view with great hesitation and diffidence—I find great difficulty in agreeing with the view which Lord Asquith expressed of *Foster* v. *Robinson*,[6] I think as obiter, in *Rogers* v. *Hyde*,[7] where Lord Asquith used this language [8]: "If it was a statutory tenancy, there is recent "and binding authority for the proposition that a contractual "(and non-protected) tenancy can replace a statutory tenancy by "a notional surrender and regrant or by other means: see for "instance, *Foster* v. *Robinson*." [9]

For my part, with great deference and respect, I find it difficult, in view of the Master of the Rolls' judgment in *Foster* v. *Robinson*,[9] to accept that as the decision in *Foster* v. *Robinson*.[9]

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[6] [1951] 1 K.B. 149.

[7] [1951] 2 K.B. 923.

[8] Ibid. 930.

[9] [1951] 1 K.B. 149.

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MURRAY BULL & CO. LD. *v.* MURRAY.

McNair J.

But, however that may be, my conclusion is, first, that the tenancy up to December 31, 1950, was a contractual tenancy, and secondly, that thereafter the occupation was an occupation under a licence which had validly terminated as at June 30, 1951, and thereafter the defendant was a mere trespasser. Accordingly, in my judgment there should be an order for possession, possession to be given up within 21 days, and an award in favour of the plaintiff company of damages for trespass, which on the undisputed evidence before me, I assess at £364.

Judgment for the plaintiffs.

Solicitors: *Barnett, Tuson & Co.; Peachey & Co.*

S. C.

1952
Oct. 27, 28, 29, 30;
Nov. 14.

Pilcher J.

TURVEY *v.* DENTONS (1923) LD.

[1951. T. 1608.]

Landlord and Tenant—Income tax—" Long lease "—Tenant's right to deduct from payments of rent income tax at standard rate—Failure to deduct—Overpayments made to landlord under a mistake of fact —Right of recovery—Finance Act, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *ss.* 13, 17*—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Case VI, Sch. D and rule* 19 *of General Rules applicable to all Schedules.*

A company held a " long lease " of premises and was, therefore, by virtue of section 17 of the Finance Act, 1940, entitled to deduct from the instalments of rent under the lease income tax at the standard rate for the time being. Owing to a mistake of fact as to the length of the lease the company failed to deduct income tax at the standard rate on making payments of rent, but for some three years merely deducted tax under Sch. A. On a claim by the company to recover the overpayments as money had and received by the lessor to the company's use:—

Held, that the company's right to deduct income tax at the standard rate on making payments of rent was not an exclusive remedy and that the company was entitled to recover the overpayments from the lessor, and that this was so although the plaintiff under the lease had a right to be paid the full rent. A claim for money paid under a mistake of fact was not limited to the case where the payee had no legal right to the money.

ACTION.

The plaintiff was the ground lessee under a 2,000-year lease of premises at 96 New Bond Street, London. During the years

1946 to 1948 the defendant company, of which one Littman was secretary and principal shareholder, carried on the business of a department store at Gloucester and elsewhere. Littman conducted the company's property dealings, but the administration of the company's day to day business was carried out at Gloucester by one Baker, the assistant secretary, who also managed the company's Gloucester store. In December, 1946, Littman arranged to take a lease of the plaintiff's premises for a term of 99 years from December 25, 1946, at a rent of £2,250 a year. The lease was duly executed on December 9, 1946, and Littman told Baker about the lease but omitted to tell him that the lease was for a term of 99 years; and Baker, owing to a previous transaction of the company in respect of the same premises, when Littman had bought on behalf of the company a sublease for 10 years of part of the premises, wrongly assumed that the lease was one for 10 years only. He at no time received a counterpart of the lease, which was kept by the company's London solicitors, and no one in the Gloucester office was ever informed of the term of the lease, although it was Baker's duty to pay all rents due on the company's premises.

As a result of what he wrongly assumed to be the true position Baker told the company's accountant that the lease was one for 10 years only, and the accountant accordingly, in about April, 1947, sent the plaintiff a cheque drawn on the company for £562 10s., the gross amount of the first quarter's rent; and for the next three and a half years he continued to send to the plaintiff cheques signed on behalf of the company for sums which in the aggregate amounted to the gross rent for that period less tax under Sch. A.

In fact the underlease of the premises was a "long lease" as defined by section 13 of the Finance Act, 1940, and by virtue of section 17 of the Act the company was entitled to deduct from the instalments of rent paid under the lease income tax at the standard rate for the time being. Section 17 of the Act of 1940 provided in substance that rent payable under a long lease should be charged with tax under Case VI of Sch. D and be treated for the purposes of such of the provisions of the Income Tax Acts as applied to royalties paid in respect of the user of a patent as if it were such a royalty. Rule 19 of the General Rules applicable to all Schedules to the Income Tax Act, 1918, provided in regard to royalties that the person paying the royalty should be entitled on making the payment to deduct income tax at the standard rate for the time being.

1952

TURVEY v. DENTONS (1923) LD.

It was not disputed that from March 25, 1947, to September 29, 1950, the company, by deducting from the rent tax under Sch. A instead of tax at the standard rate for the time being, had paid to the plaintiff the sum of £1,572 2s. 6d. more than they would have done if they had deducted from the rents so paid tax at the standard rate.

At the end of 1950 the company became aware of their error in failing to deduct tax at the standard rate on making payment of rent, and they later withheld payments of rent in order to recompense themselves for the rent which they considered that they had overpaid.

The plaintiff brought an action claiming possession of the premises, rent and mesne profits. The defendant company did not seek to justify the withholding of rent and conceded that since December 25, 1950, they had wrongly retained net sums of rent due to the plaintiff amounting to £914 1s. 3d. They claimed, however, to be entitled to set off against the plaintiff's claim for rent the sum of £1,572 2s. 6d. as money paid under a mistake of fact, alleging that it was money had and received by the plaintiff to the company's use, and they counterclaimed for the balance due after the set-off had been made.

Avgherinos for the defendant company. The defendants have overpaid the sum of £1,572 2s. 6d. to the plaintiff, and that overpayment was the direct result of a mistake regarding the length of the lease, which was a mistake of fact. But for that mistake the overpayments would not have been made; the responsible officers of the defendant company knew the difference between a short and a "long" lease but mistakenly thought the lease in question to be for 10 years only, and the one member of the company who knew the length of the lease was unaware that the overpayments were being made.

It is submitted that the following propositions apply: (1) where money is paid with a full knowledge of the facts, it is a voluntary payment and is irrecoverable; (2) where money is paid with full knowledge of the facts but under a mistake of law, it is equally irrecoverable; (3) where it is paid under a mistake about a material fact it can be recovered and it matters not that the payor had a means of knowledge or that his mistake arose from carelessness or negligence; (4) in the case of a limited company if one agent makes a payment under a mistake of fact it is immaterial that another agent has a full knowledge of the facts and the money is recoverable by the company unless the agent who had knowledge of the facts was aware that the payments were being made: see Halsbury's Laws of England, 2nd ed., Vol. 23, pp. 162, 166; *Anglo-Scottish Beet Sugar Corporation Ld.* v. *Spalding Urban District Council*,[1] and *Armstrong* v. *Strain.*[2]

As regards the income tax position, the authorities show that if a person who has a right to deduct tax from a particular payment fails to make that deduction, he cannot make a similar deduction from a subsequent payment. It is equally clear that if, with full knowledge of the facts, he fails to deduct, he cannot recover the money by action, counterclaim or set-off, because the overpayment is treated as a voluntary payment or a payment made under a mistake of law: see Halsbury's Laws of England, 2nd ed., Vol. 17, p. 237, para. 477; Konstam's Income Tax Law, 11th ed., p. 268, section 225, and *Denby* v. *Moore*,[3] *per* Abbott J.[4] There is nothing in the authorities to show that money overpaid as the result of a failure to deduct income tax at the appropriate rate cannot be recovered if the payor has a valid cause of action on some other ground. In certain cases money overpaid owing to a failure to deduct has been held to be recoverable. *In re Musgrave* [5] shows that under equitable principles, even if there has been a mistake of law, as between a trustee and a cestui que trust the money can be recovered: see *Lamb* v. *Brewster.*[6] Although there is no authority directly in point in relation to the recovery of money paid under a mistake of fact in tax deduction cases, the decisions which decide that money overpaid under a mistake of law in such cases is irrecoverable support the view that in cases where money is paid under a mistake of fact it is recoverable: see *In re Hatch*,[7] which was criticized in *In re Diplock* [8] in the Court of Appeal.

It is submitted that the defendants are entitled to recover £1,572 2s. 6d. as money had and received by the plaintiff to their use.

P. M. B. Rowland for the plaintiff. It is submitted that the overpayments in question were made under a mistake of law, because the persons making the payments did not appreciate the importance of the length of the lease; and it is for the defendants to satisfy the court that the payments were made under a mistake of fact.

If, contrary to that submission, the money was paid to the plaintiff under a mistake of fact, it is still irrecoverable by the defendant company. First, it is irrecoverable because the defendants failed to take advantage of the legal right which section 17 of the Finance Act, 1940, gave them to deduct tax at the standard rate on making payments of rent. In *Kelly* v. *Solari*[9] and *Anglo-Scottish Beet Sugar Corporation Ld.* v. *Spalding Urban District Council*[10] the mistakes were of an entirely different nature. A confusion has arisen because in so many of these cases the mistake was one of law, and that has tended to obscure the true position: see *In re Musgrave.*[11] The plaintiff had a legal right to be paid the full amount of rent, subject only to the defendants' statutory right of deduction at the time of paying the rent. As the defendants did not take advantage of their right to deduct, they cannot thereafter recover the overpayments. Money paid under a mistake of fact is only recoverable where the money has not been legally due to the payee. The money was legally due to the plaintiff, and once it was paid it was lawfully paid. The principles applicable have been discussed in cases on deduction of property tax: *Currie* v. *Goold*[12] and *Cumming* v. *Bedborough.*[13] To permit the defendants to recover the payments would nullify the legislature's clear intention that deductions for income tax should be made at the earliest opportunity. This intention has been a feature of income tax law from its inception and is also found in the case of short leases and payments of annuities under rules 19 and 21. If action were held to lie in these circumstances the absurd result would follow that the clear wording of the statutes could be ignored however negligent the payor was: see *Kelly* v. *Solari*[14] and *Anglo-Scottish Beet Sugar Corporation Ld.* v. *Spalding Urban District Council.*[15]

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[1] [1937] 2 K.B. 607.

[2] [1952] 1 K.B. 232.

[3] (1817) 1 B. & Ald. 123.

[4] Ibid. 130.

[5] [1916] 2 Ch. 417.

[6] (1879) 4 Q.B.D. 220, 607.

[7] [1919] 1 Ch. 351.

[8] [1948] Ch. 465.

A tenant's statutory right to deduct income tax at the standard rate on making a payment of rent is an exclusive right, and the tenant who fails to take advantage of it cannot later take legal process against the landlord to recover the overpayments. The action for money had and received does not lie at the suit of a person who has failed to exercise a statutory relief granted to him. The action for money had and received has a twofold basis: implied contract—which obviously cannot apply here as the contract was express—and unjustifiable enrichment of the defendant. Although the latter might at first sight seem applicable here, the

[9] (1841) 9 M. & W. 54.

[10] [1937] 2 K.B. 607.

[11] [1916] 2 Ch. 417.

[12] (1817) 2 Madd. 163.

[13] (1846) 15 M. & W. 438.

[14] 9 M. & W. 54.

[15] [1937] 2 K.B. 607.

action for money had and received has never been conceived as a means of adjusting the individual rights of parties.

Cur. adv. vult.

November 14. PILCHER J. stated the facts substantially as set out above and continued:—In those circumstances the plaintiff's claim was formulated for possession, for rent and for mesne profits. The defendants do not now contend that they were entitled in law to withhold future payments of rent to recoup themselves for rent overpaid to the plaintiff during the material period. They concede that they have wrongly retained since December 25, 1950, net sums of rent due to the plaintiff, amounting to £914 1s. 3d., but they claim, in the following circumstances, to be entitled to set off against the plaintiff's claim for rent the sum of £1,572 2s. 6d. as money paid under a mistake of fact. They further counterclaim for the balance due in either event after the set off has been made. This claim is accurately laid in paragraph 12 of the defence and counterclaim as money had and received by the plaintiff to the use of the defendants.

On behalf of the defendants it was submitted by Mr. Avgherinos that the evidence established that throughout the material period the defendants' accountant had made out and Baker, as their manager, had approved and signed the cheques for rent of the New Bond Street premises, and that the total over-payment made to the plaintiff by such cheques was £1,572 2s. 6d. These matters were not in dispute.

Mr. Avgherinos' next submission was that these over-payments were made by Baker and Shawe as a direct result of a mistake of fact, namely, that Baker had wrongly inferred that the lease under which the payments were being made was a short lease whereas in fact it was a long lease and that, but for this mistake of fact by these two gentlemen, income tax at the standard rate would have been deducted from the payments made.

[His Lordship reviewed the evidence and continued:] I am satisfied that all the over-payments in question were made by Baker and Shawe on the mistaken assumption of fact that the lease in question was one of 10 years, and that neither Baker nor Shawe, who alone were concerned with making the payments of rent, had any idea that the lease was in fact a long lease until Shawe's attention was drawn to this fact by the company's auditors. The latter only became aware of the fact because the Inspector of Taxes happened to mention the matter in a letter dated August 30, 1950.

I am also satisfied that if Baker and Shawe, or either of them, had known that the lease was in fact for a term of 99 years, income tax at the standard rate would throughout the period have been appropriately deducted. The length of the term of a lease is a question of fact and I accordingly find that the defendants made the over-payments of rent amounting in total to £1,572 2s. 6d. under a mistake of fact.

I should add this. Littman, who was in sole charge of the defendant company's property deals, knew the length of the lease, knew that it was a long lease, and knew his rights under such a lease. I find that he did not in fact know the basis upon which rent was being paid. I am fully satisfied that if he had known of it he would have intervened at once and seen that the appropriate deductions were made. There is no doubt that Baker was not justified upon the facts in assuming that the lease was a long lease. It is also remarkable that neither he nor Shawe were ever precisely informed as to the term of the lease. There was clearly a lack of liaison between Littman, the company's solicitors, and the Gloucester administration. It seems probable, moreover, that there was some degree of carelessness.

It is, however, clear upon authority that where, as in the present case, a limited liability company is concerned and payments are made under a bona fide mistake of fact by an authorized agent of the company, the fact that some other agent of the company may have had full knowledge of all the facts does not disentitle the company to recover the money so paid, provided that the agent with the full knowledge does not know that the payments are being made on an erroneous basis. For this proposition I need only refer to the case of *Anglo-Scottish Beet Sugar Corporation Ld.* v. *Spalding Urban District Council*,[15] where the facts were curiously similar to those which I have had to consider in the present case. In that case over-payments in respect of water supplied by the defendants were made over a period by the manager of one of the plaintiffs' factories, who had not been informed, as he should have been, that the managing director of the company had negotiated a new agreement with the defendants whereby the sum payable by the plaintiffs to the defendants for water had been substantially reduced. In that case the carelessness of the various officials of the company was more pronounced than any carelessness which can properly be attributed to Littman, Baker, Shawe, the defendants' auditors, or any other agent of the company.

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[15] [1937] 2 K.B. 607.

Unless, therefore, it could properly be said that there is some feature in the present case which disables the defendants from recovering as money paid under a mistake of fact the over-payments they have made to the plaintiff, I should hold that they are entitled to succeed upon this particular issue.

On behalf of the plaintiff, Mr. Rowland made the following submission. He argued that even if these over-payments were in truth made under a mistake of fact they are none the less irrecoverable because under the lease the plaintiff was entitled, or had a legal right, to be paid the full rent. The defendants, according to Mr. Rowland, were bound to pay the full rent, subject only to their statutory right to deduct income tax at the standard rate at the time of making the payment. Mr. Rowland contended that in every case where money paid under a mistake of fact has been held to be recoverable, the money has not in fact been legally due to the payee. He submitted that it was upon this basis that a claim for money paid under a mistake of fact was always laid as for money had and received to the use of the payor, namely, that it was money paid by the payor to the payee, to which the latter had no legal right.

I was not impressed with this argument. As I understand it, the scheme of the relevant statutory provision of the Tax Acts is that when the rent payable on a long lease is in fact paid wholly out of the profits or gains brought into charge for any accounting year, that is to say, in the case of a trading company in the position of the defendants, where the company is trading at a profit after debiting the rent in question in the account, the tenant, in this case the company, is entitled to deduct from the gross rent due to the landlord under the lease tax at the standard rate, because the rent shown in the accounts has been paid out of profits or gains of the company brought into charge and the revenue will receive tax upon the general profits of the company, which would naturally have been less if no deduction of tax had been made when paying the rent.

Whilst the tax position is complicated and was not very fully argued before me, it was not in dispute and was conceded by Mr. Rowland that as a result of the defendants' failure to deduct income tax at the standard rate at the proper time they had indirectly borne the proportion of the tax which was represented by the difference between income tax at the standard rate upon the gross rent and tax under Schedule A.

It follows, therefore, that the defendants, in addition to discharging all their tax obligations to the Inland Revenue, have paid to the plaintiff a substantial sum for which, as far as I am aware, she will not have to account to the Inland Revenue. The plaintiff was warned by her solicitor at an early stage that the defendants were paying her more rent than they need and that she would do well to earmark the over-payments as they might have to be reimbursed.

It is clear that morally there are very few merits in the plaintiff's case. The old count for money had and received has sometimes been said to be based upon the view that the payee ought not to be unjustifiably enriched. If my broad view of the tax position is correct, there seems little doubt that the plaintiff in this case has been unjustifiably enriched by accepting and retaining money paid to her by the defendants under a mistake of fact. All that she could have legally required the defendants to do was to pay her rent after deduction of tax at the standard rate. In the result she has in fact received and retained a sum in excess of what she was legally entitled to and I accordingly reject this branch of Mr. Rowland's argument.

The next point taken by Mr. Rowland was that the tenant's right to deduct income tax at the standard rate on making a payment of rent was an exclusive remedy and if he failed to exercise his right to deduct at the appropriate time no other legal process was available to him to recover from his landlord over-payments of rent made under a mistake of fact.

I think that this argument also is misconceived. It is clear that if the tenant wants to make the permissible deduction from his gross rent he must make it, by way of deduction from rent, at the appropriate time. On general principles, I can see no ground for saying that because a tenant has paid more rent than he legally need under a mistake of fact and is unable to recover such over-payment by deduction because he has not made the permissible deduction at the time provided by the legislature, he should be debarred from invoking the general remedy available to all persons who have inadvertently paid money under a bona fide mistake of fact.

In *Denby* v. *Moore*[16] a tenant had for many years voluntarily paid the gross rent of a farm to his landlord and also the Schedule A tax, which he was, of course, entitled to deduct from the gross rent, to the Inland Revenue. He then sued his landlord in assumpsit for money had and received for the sum representing the Schedule A tax so overpaid over the years. He was held not entitled to recover on the grounds that he had voluntarily paid both full rent and tax. Abbott J., having so held, said [17]: "I do not say, however, that the clause giving the "power of deduction takes away all other remedies." This passage, whilst not necessary for the decision of the case, seems to support the view that where a fiscal Act gives the tenant a right to make a deduction of rent, of which he does not avail himself, his general right to recover the sum overpaid by appropriate action is not necessarily extinguished.

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[16] 1 B. & Ald. 123.

In *Ord* v. *Ord* [18] a husband had paid the gross sum due under an annuity to his wife without any deduction of tax. The payments were made voluntarily with full knowledge of the facts but under what was pretty clearly a mistake of law. Lush J. there said [19]: "The rule does not in terms say that if the person "paying is to deduct tax, he must deduct it from the next "instalment of the annuity, as is provided in the case of a tenant "paying property tax, but the language of the rule, in my "opinion, shows that that is intended. Whether the rule means "that the only remedy of the payer of the annuity is to deduct "the tax is a difficult question, as to which I think the "authorities differ. If the defendant had not voluntarily paid "to his wife the sum that he paid on her behalf by way of tax, "it may be (it is not necessary to decide it) that he could "maintain an action against her for money paid to her use."

The case of *Lamb* v. *Brewster* [20] is also an authority for the proposition that a tenant who has not deducted Schedule A tax at the appropriate time can recover the tax not deducted by appropriate action.

I therefore hold that the right to deduct granted by the section with which I am dealing is not an exclusive remedy and that this branch of Mr. Rowland's argument also fails.

The next argument presented on behalf of the plaintiff was based on the fact that there appears to be no decided case in which a plaintiff suing for money had and received has been held entitled to recover money due to the Inland Revenue which he could have deducted but has failed to deduct at the appropriate time. The short answer to this point is, in my view, that the reported cases to which I was referred were all clearly cases in which the payor had either voluntarily paid the larger sum with full knowledge of the facts or had made the payment under a mistake of law. The very fact that in these cases unsuccessful attempts were made to recover by action sums not deducted on making a payment of rent rather tends to show that the remedy by deduction is not exclusive and that if a tenant, who has failed to deduct at the appropriate time, can show that his failure was due solely to a mistake of fact he can recover as for money had and received. In this connexion I refer to the case of *In re Hatch.*[21]

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[17] 1 B. & Ald. 123, 130.

[18] [1923] 2 K.B. 432.

[19] Ibid. 445.

[20] 4 Q.B.D. 220, 607.

I accordingly find that the defendants are entitled to recover from the plaintiff the sum of £1,572 2s. 6d. under the claim for money had and received. The plaintiff's net claim for rent, namely, £914 1s. 3d., is not disputed. Against this sum the defendants are, however, entitled to set off an aliquot sum and to recover the balance, namely, £658 1s. 3d., on their counterclaim.

The result is that the plaintiff's claim fails and there will be judgment for the defendants on the counterclaim for £658 1s. 3d.

Judgment for the defendant company.

Solicitors: *Last, Sons & Fitton; Littman & Co.*

S. C.

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[21] [1919] 1 Ch. 351.

Oct. 3.

Ormerod J.

DICKINSON v. MINISTER OF PENSIONS.

Pension—Claim by widow of deceased officer—Entitlement—Onus of proof—Death more than seven years after termination of service—Royal Warrant, 1949 (*Cmd.* 7699), *arts.* 4 (2), 5 (1) (*a*) *and* (2).

When, under article 5 (2) of the Royal Warrant, 1949, a claim for a pension is made after more than seven years have elapsed between the date of the claim for disablement or, alternatively, the death of the person in respect of whom a claim is preferred, and the termination of the service, the onus is on the claimant to establish entitlement to a pension and not on the Minister of Pensions to prove non-entitlement, as is the case under article 4 (2) when a claim is made before the expiration of seven years.

PENSIONS APPEAL.

The claimant, Gladys Eleanor Dickinson, the widow of Major G. C. Dickinson, appealed from the decision of the Pensions Appeal Tribunal dismissing a claim by her to a pension in respect of the death of her husband on the ground that his death was not attributable to war service. The claimant's husband was an army officer who rejoined the Army from the reserve of officers at the age of 50 on September 18, 1939. He served until August 7, 1940, when he was invalided on account of neurasthenia. He was subsequently awarded a pension on the ground that his neurasthenia had been aggravated by his war service. On September 22, 1950, more than 10 years after the termination of his service, he died as a result of coronary thrombosis. His widow claimed that his death was substantially hastened by his war service, on the ground that the stress and strain of worry caused by the neurasthenia (which in its turn had been aggravated by war service) had had a serious effect on the condition of the arteries, which finally resulted in death from coronary thrombosis. The Pensions Appeal Tribunal, in their decision dismissing the appeal, after saying that they accepted the opinions given by the medical services division as being medically sound, said that they were satisfied "that it has not been shown that Major Dickinson's "death from coronary thrombosis ten years after his war service "ended was in any way connected with that service."

F. R. McQuown for the claimant.
J. P. Ashworth for the Minister.

The arguments and relevant articles of the Royal Warrant, 1949, appear from the judgment.

ORMEROD J. stated the facts and continued:—The tribunal decided the question before them on the basis that, as the death of the deceased took place more than seven years after the termination of his war service, the onus of proof was on the claimant to satisfy the tribunal that the death of the deceased was "due to or substantially hastened by" service, and not on the Minister, as would have been the case if Major Dickinson had died within seven years of the termination of his service.

Mr. McQuown has argued, with very great force and considerable skill, that the tribunal misdirected itself on the question of onus of proof, and that even although the death of the deceased, Major Dickinson, occurred more than seven years after the termination of his service, the burden of proof was still on the Ministry, and therefore the appeal should be allowed.

The argument which is put forward by the appellant is based on the provisions of articles 4 and 5 of the Pensions Warrant in its present form, that is to say, the Pensions Warrant of 1949. Article 4 of the present warrant, which is the article which is concerned with the question of entitlement, provides for cases where the claim is made or death takes place not more than seven years after the termination of the service in respect of which the claim is made. Paragraph (2) of article 4 provides: "Subject to "the following provisions of this article, in no case shall there be "an onus on any claimant under this article to prove the fulfil-"ment of the conditions set out in paragraph (1) of this article "and the benefit of any reasonable doubt shall be given to the "claimant."

It is quite clear that the onus of proof is not on the claimant to establish his claim in a case which comes under article 4 of the warrant, and, indeed, it has been held in Scotland in *Irving* v. *Minister of Pensions*[1] that the effect of paragraph (2) of article 4 must be that the onus of proof is on the Ministry to show that the claimant is not entitled to a pension in the circumstances in which the pension is claimed.

Article 5 of the warrant is concerned with claims which are made when a period longer than seven years has elapsed between the date of the claim or, alternatively, the death of the person in respect of whom the claim is made and the termination of the service. Article 5 provides for entitlement to pension in almost exactly the same words as article 4, with the exception that, in the case of a claim in respect of death, article 4 says when "the "death was due to or hastened by an injury which was attri-"butable to service," whereas article 5 says when "the death "was due to or substantially hastened by an injury which was "attributable to service." It is to be assumed that the word "substantially" has been put in for a purpose, and that a greater effect of the conditions, so far as hastening death is concerned, must be proved before an award can be made under those circumstances, but that is a matter which probably does not affect the question in issue here.

There is no paragraph in article 5 which states (as does paragraph (2) of article 4) that in no case shall there be an onus on the claimant. That is omitted, and it is, I think, proper to assume that it has been expressly omitted from the wording of article 5 of the Royal Warrant. In place of paragraph (2) of article 4, article 5 states in paragraph (2): "A disablement or "death shall be certified in accordance with paragraph (1) of this "article if it is shown that the conditions set out in this article "and applicable thereto are fulfilled." Paragraph (4) of article 5 provides: "Where, upon reliable evidence, a reasonable doubt "exists whether the conditions set out in paragraph (1) of this "article are fulfilled, the benefit of that reasonable doubt shall "be given to the claimant."

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[1] 1946 S.L.T. 34.

As I understand it, Mr. McQuown puts his argument in this way: he says that article 5 is ambiguous; that the position as it existed in 1939 was that the onus of proof was not on the claimant, whether the claim was made within seven years or after seven years of the termination of the service, and that (although the warrant as it at present exists is a complete repeal of the warrant as it existed previously) the provisions of the warrant which was in use previously must be taken into consideration; that it must be accepted that there was an alteration (or an attempted alteration) of the position, and that such alteration, if it is valid, must be in terms which admit of no ambiguity or doubt, and that, under these circumstances, as it is not stated specifically in article 5 of the warrant that the onus of proof shall be on the claimant, by the ordinary rules of interpretation, the position must be as it was before this warrant came into force, and, as it is in article 4 of the warrant, the onus of proof must still be on the Ministry and not upon the claimant.

He says, further, that paragraph 4 (which provides in paragraph (4) (*b*), "where, upon reliable evidence, a reasonable doubt "exists whether the conditions set out in paragraph (1) of this "article are fulfilled, the benefit of that reasonable doubt shall "be given to the claimant"), can mean only one thing; that it is impossible to say that the onus of proof must be on the claimant and at the same time, if there is a reasonable doubt, he must have the benefit of that doubt; that these words in themselves, if they do not go so far as to say in specific terms that the onus of proof is on the Ministry, can be consistent only with that proposition.

After considering the terms of article 5 of the warrant, I find that I cannot accept the contentions which have been put forward by Mr. McQuown. He submits that the pensions warrant does not so much establish rights to be decided in a court of law as to set out, as it were, the administrative rules by which pensions should or should not be granted as the case may be. That, I think, cannot be accepted as a proper statement of the position. The effect of the Royal Warrant is, of course, in a proper case to entitle a man, who has a proper claim, to a pension, and the relevant articles of the Royal Warrant set out the circumstances under which he shall be entitled and the way in which that entitlement shall be established.

It is, I think, axiomatic in the administration of our law that, if a person thinks that he has a claim against another person, or against a Ministry, the duty is on him to establish that claim. The mere fact that an Act of Parliament does not state that that duty is on him, if it establishes a right, must, I think, automatically establish the duty on him to prove what he thinks is his right before he can succeed in his claim. That is, I think, recognized by those who framed this warrant because article 4 of the warrant, having set out the conditions under which a man may be entitled to a pension, provides specifically that the onus of proof shall in no case be on the claimant; in other words, the onus of proof shall be on the Ministry or the respondents to the claim. That has been done for the specific purpose of providing an exception to what is clearly an accepted rule.

That has not been done in article 5. In article 5 no exception is made, and there is no provision that there shall be no onus of proof upon the claimant. Therefore, on the face of it, it must, I think, follow that the claimant, in order to succeed, must satisfy the court or the tribunal (whichever body has to decide the matter) that the conditions which entitle him to an award have been satisfied. But article 5 goes much further than that because it provides in paragraph (2):

"A disablement or death shall be certified . . . if it is shown "that the conditions set out in this article and applicable thereto "are fulfilled."

Mr. McQuown argues that there is nothing there to say who shall show that the conditions of the articles are fulfilled; that duty might be on the claimant, or it might be on the Ministry, or it might be on other unspecified persons. That, I think, again is an argument which cannot be accepted. It appears to me clear that, where it is provided that a pension shall be awarded if it is shown that the conditions set out in the article are fulfilled, it must mean if it is shown by the person making the claim that the conditions applicable thereto are fulfilled.

In those circumstances I am satisfied here that there is no ambiguity in the wording of article 5 of this warrant, and that the rules of construction which Mr. McQuown has very properly prayed in aid of this case are matters which do not fall for consideration. I am satisfied that the article in itself leaves it quite clear that after seven years a claimant may still be entitled, under the proper conditions, to a pension provided that it is shown by him that the conditions of entitlement have been fulfilled.

A further real difficulty in this case is the wording of paragraph (4) of article 5 which, as I have said, provides that if a reasonable doubt exists the benefit of that reasonable doubt shall be given to the claimant. Mr. McQuown argues with some authority (the authority of the Lord Justice Clerk in *Mitchell* v. *Minister of Pensions*[2]) that if the claimant is to be given the benefit of the doubt in the case of a reasonable doubt, it can mean only one thing: that the onus of proof must be on the Ministry, because, if the burden of proof is put on the claimant to begin with and if he is then given the benefit of the doubt, that burden of proof must shift at some stage of the case.

I agree with Mr. McQuown that the wording of that paragraph is probably unfortunate, but I am satisfied that the intention of the paragraph is that it is the duty of the claimant to produce reliable evidence to establish his claim, but if (after hearing and considering that reliable evidence, and making a comparison between such evidence and other evidence which is called on behalf of the Ministry to contradict, or to contravert it) the tribunal has a reasonable doubt, then in those circumstances the plain meaning of that paragraph of the article is that the benefit of that doubt shall be given to the claimant.

Therefore, as I see it, the tribunal have directed themselves properly on this question of onus. They state in their judgment that they are satisfied that it is not shown that the death of Major Dickinson from coronary thrombosis was connected with such service. That means that they were not in any doubt, reasonable or otherwise, and there was no reasonable doubt the benefit of which could be given to the claimant. It follows that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Fowler, Legg & Co.; Treasury Solicitor.*

P. B. D.

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[2] 1946 S.L.T. 38.

C. A.

1952
Oct. 9, 10,
13, 14, 17;
Nov. 3.

Evershed M.R.,
Denning and
Romer L.JJ.

BOYER *v.* WARBEY.

[Plaint No. 1334.]

Landlord and Tenant—Rent restriction—Lease provides for payment by tenant of £40 *at end of tenancy towards redecoration—Assignee holds over as statutory tenant—Possession given up—Three months' notice to quit not given—Liability of statutory tenant to pay rent after giving up possession—Whether liability to pay* £40 *binding on statutory tenant—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15 (1).

By a tenancy agreement dated March 7, 1945, a flat within the protection of the Rent Restriction Acts was let to the defendant's predecessors in title for three years from February 8, 1945, at a rent of £175 per annum. The agreement imposed on the tenant an obligation to do certain repairs, and by clause 7 the tenant undertook on quitting the premises to pay the sum of £40 towards the redecoration of the flat. The tenant assigned the residue of the term to the defendant, who, on the determination of the original term, continued in occupation of the flat as statutory tenant. He left the premises on August 30, 1951, without giving any notice to quit to the landlords, the plaintiffs. The tenant sent the keys of the premises to the landlords on September 29 and they relet the premises on November 20, 1951. In these proceedings the landlords claimed, first, rent up to the date of reletting, on the ground that they were entitled under section 15 (1) of the Rent Restriction Act of 1920 to three months' notice to quit, and, secondly, the sum of £40 payable under clause 7 of the tenancy agreement. The county court judge gave judgment for the landlords on both claims. The tenant appealed:—

Held, first, that the defendant as statutory tenant was not entitled to give up possession except on giving not less than three months' notice to quit in accordance with the provisions of section 15 (1) of the Rent Restriction Act of 1920. The landlords were not bound to accept possession whenever the tenant chose to offer it. They were entitled to hold him to the tenancy until he gave a valid three months' notice to quit. As soon as the landlords relet, the statutory tenancy came to an end by surrender by operation of law. Until the statutory tenancy came to an end by a valid notice to quit or by surrender the landlords were entitled to hold the tenant liable for rent.

Held, secondly, that on the true construction of clause 7 of the tenancy agreement, the £40 payable at the determination of the contractual tenancy was not a penalty. An agreement to pay a reasonable sum in lieu of a covenant to deliver up in repair would touch and concern the demised premises and run with the land so as to bind the assignee of the term as soon as he entered into possession. Since the fusion of law and equity the distinction between agreements under hand and covenants under seal had been largely obliterated and there was no reason why the law relating to covenants running with the land or with the reversion should not apply equally to agreements under hand. That principle applied not only in the case of agreements for more than three years which needed the intervention of equity to perfect them, but also in the case of agreements for three years or less which did not.

Held, thirdly (Evershed M.R. dubitante), that on the true construction of clause 7 the agreement to pay £40 was binding on the tenant as assignee of the original tenant.

Held, fourthly (Evershed M.R. dubitante), that when the original term came to an end, by virtue of the provisions of section 15 (1) of the Act of 1920 the defendant stayed on as statutory tenant subject to all the terms and conditions of the original tenancy agreement "so far as the same are consistent with the "provisions of this Act." The agreement to pay £40 was incorporated into the statutory tenancy. Clause 7 of the tenancy agreement was not inconsistent with the provisions of the Act.

Per Evershed M.R.: Except in those cases which involve the question whether the provisions of the Rent Restriction Acts have been complied with, the rule laid down by the House of Lords in *Smith* v. *Charles Baker & Sons* [1891] A.C. 325, namely, that a point of law cannot be raised on appeal from a county court unless it was taken in the county court, is of universal application.

Elvins v. *Slaney* [1948] W.N. 129 considered and explained.

APPEAL from a decision of Judge Reid sitting at West London county court.

By a tenancy agreement dated March 7, 1945, made between the plaintiffs' predecessors in title as landlords and a Mrs. Crossley as tenant, a flat, No. 36 Bullingham Mansions, Kensington, being premises within the protection of the Rent Restriction Acts, was let for three years certain from February 8, 1945, at a yearly rent of £175. By clause 2 of that agreement the tenant undertook to "make good any damage which may be done to the interior of "the said premises and keep the water closets free, unstopped "and in proper acting order, and to renew and reinstate any "cracked or broken stoves, fire grates or any part or parts thereof, "or sash lines requiring renewal, and as often as need or occasion "shall require to thoroughly sweep and cleanse all chimneys and "flues and clean all the windows and glass in or belonging to the "said flat and also to reinstate and repair any broken windows or "glass, and to keep all locks and fastenings perfect and generally "to keep the interior of the said flat, rooms and premises, and "all stoves, bells, cupboards, fixtures and things thereto belonging "in as good repair and condition as the same are now respectively "in and will so leave the same at the end of the tenancy." It was provided by clause 7: "Provided always and the tenant for "herself and her assigns hereby agrees with the landlords and "their assigns that she the tenant will on her or their quitting "the said premises at the end of the term hereby granted (but "without prejudice to the provisions, agreements and conditions "hereinbefore contained) pay to the landlords or their assigns "immediately after the expiration or determination of the tenancy "whenever it shall happen the full sum of £40 towards the "redecoration of the said suite of rooms or flat, which sum shall "be accepted by the landlords in full satisfaction and discharge "of all claims against the tenant for repairs to or decoration "of the said premises subject to and without prejudice to the "liability of the tenant to make good any damage caused by "unfair wear and tear of the said premises."

By an assignment of January 30, 1948, the tenancy was with the landlords' consent assigned to the defendant, Mr. Warbey. The tenancy expired on February 8, 1948, and thereafter the defendant (hereinafter called "the tenant") continued in occupation as statutory tenant until August 30, 1951, when he left the premises. The tenant never gave to the plaintiffs, the then landlords of the premises (hereinafter called "the landlords"), three months' notice to quit in accordance with the provisions of section 15 (1) of the Rent Restrictions Act of 1920.[1] On September 29, 1951, the tenant sent the keys of the premises to the landlords, who relet the premises on November 20, 1951.

In this action the landlords claimed from the tenant, first, a sum of £78 11s. 11d. for unpaid rent to November 20, 1951, when they relet the premises; secondly, the sum of £40 as payable under clause 7 of the tenancy agreement. The county court judge gave judgment against the tenant for £118 11s. 11d., being the aggregate of the sums claimed.

The tenant appealed. On the appeal the question was raised whether certain correspondence on its true construction amounted to an agreement determining the tenancy. The Court of Appeal held that it did not. The decision on the matter does not call for report.

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[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1): "A tenant who by virtue "of the provisions of this Act retains "possession of any dwelling-house to "which this Act applies shall, so long "as he retains possession, observe "and be entitled to the benefit of all "the terms and conditions of the "original contract of tenancy, so far "as the same are consistent with the "provisions of this Act, and shall be "entitled to give up possession of the "dwelling-house only on giving such "notice as would have been required "under the original contract of "tenancy, or, if no notice would have "been so required, on giving not less "than three months' notice. . . ."

J. F. F. Platts-Mills for the tenant. It is submitted that the tenant is not limited on the appeal to arguing points of law which were expressly taken in the county court. It is permissible to take new points of law which arise from the facts found by the judge. This appears from the note in the Annual Practice (1952), p. 1250, founded on *Elvins* v. *Slaney.*[2]

The tenant's first contention is that the judge was wrong in awarding to the landlords rent until the date when they had relet the flat. When the tenant abandoned possession the statutory tenancy automatically determined and accordingly the liability to pay rent also ceased: see *Brown* v. *Brash and Ambrose.*[3] If a statutory tenant voluntarily gives up his statutory tenancy, the tenancy is at an end and there is nothing in the Rent Restriction Acts which imposes a liability to continue to pay rent. The tenant's failure to give to the landlords three months' notice to quit in accordance with the provisions of the Rent Restrictions Act of 1920 was a breach of a statutory obligation which entitled the landlords to damages. The measure of such damage was not the rent payable. The landlords should have taken steps to mitigate the damages. They could have relet sooner. The landlords did not do so because they wanted to find a tenant who would pay a premium. The tenant should not be made to pay for the landlords' delay in finding a new tenant. [He referred to *Oastler* v. *Henderson*[4]; *King's College, Cambridge* v. *Kershman*[5]; Mayne on Damages, 11th ed., p. 147; Megarry, The Rent Acts, 6th ed., p. 176.]

With regard to the claim for £40, it is submitted that this provision of the original tenancy is not carried over into the statutory tenancy. [He referred to Megarry, The Rent Acts, 6th ed., p. 165; *Langford Property Co. Ld.* v. *Saunders.*[6]] Further, the provisions of this tenancy as to repairs are confused. The provisions of clause 7 constituted a penalty and were not binding on Mrs. Crossley, the original tenant.

Lionel A. Blundell for the landlords was not called on to argue the first point. The tenant's undertaking to pay £40 at the end of the tenancy is binding on the original tenant's assigns. [He referred to *Spencer's Case*[7]; *Vernon* v. *Smith*[8]; *Dyson* v. *Forster*[9]; *Lord Howard de Walden* v. *Barber*[10]; Halsbury's Laws

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[2] [1948] W.N. 129.

[3] [1948] 2 K.B. 247.

[4] (1877) 2 Q.B.D. 575.

[5] (1948) 64 T.L.R. 547.

[6] [1947] L.J.N.C.C.R. 113.

[7] (1583) 5 Co.Rep. 16a.

[8] (1821) 5 B. & Ald. 1.

[9] [1909] A.C. 98.

[10] (1903) 19 T.L.R. 183.

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of England, 2nd ed., Vol. 20, p. 357, note (*h*); *In re Hunter's Lease.*[11]]

The decision in *Moss' Empires Ld.* v. *Olympia (Liverpool) Ld.*[12] is an interesting analogy. There are a number of cases in which it has been held that a covenant to spend money runs with the land: see *Mansel* v. *Norton.*[13] It is necessary, first, to construe the covenant. If the covenant is to pay a sum which is directly related to the condition of the premises, such as this covenant, which relates to redecoration, it runs with the land. Clause 7 of this agreement is inextricably bound up with the repairing covenants.

The fact that the tenant's undertaking is an agreement under hand only is not material. Since the Judicature Act, 1873, a person who takes as an assignee of an agreement under hand should be treated as having an agreement which is specifically enforceable. The position is the same whether the covenant is in an agreement under hand or in a lease by deed. The observations in Woodfall on Landlord and Tenant, 24th ed., pp. 551, 552, do not go far enough.

Cur. adv. vult.

November 3. The following judgments were read:—

Evershed M.R. There is one preliminary matter of some importance with which I desire to deal. The case has indubitably involved consideration of points of difficulty. It was said by Mr. Blundell that some of Mr. Platts-Mills' arguments were never put to the county court judge. Mr. Platts-Mills says that the general defence of non-liability was put and that in any case all the materials necessary to decide all the points were before that court. He relies particularly upon a note in the Annual Practice for 1952, at p. 1250. That note, which is under Ord. 58, r. 4, says, so far as relevant, as follows: "The Court of Appeal has "jurisdiction to allow a point of law not raised at the trial to be "taken on appeal; the matter is one of discretion." Then, after some other sentences, there occurs this sentence: "The same "principle applies on an appeal from a county court" (*Elvins* v. *Slaney*[14]).

The general rule in regard to county court appeals was laid down as long ago as 1891 by the House of Lords in *Smith* v.

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[11] [1942] Ch. 124.
[12] [1939] A.C. 544.
[13] (1883) 22 Ch.D. 769.
[14] [1948] W.N. 129.

Charles Baker & Sons,[15] the rule being that the point in a county court appeal to be argued in this court must have been taken in the county court. Apart from such points as arise out of the mandatory terms of the Rent Acts to the effect that "no order for "possession shall be made unless" the statutory requirements are satisfied (whatever be the exact ambit of that exemption, it has clearly no application here), the general rule must be followed. In that respect, plainly, county court appeals differ from High Court appeals. In my judgment, therefore, the note in the White Book is incorrect, and it is in any case, as I read it, unsupported by the case of *Elvins* v. *Slaney*,[16] upon which it purports to be founded. *Elvins* v. *Slaney*[16] was a case in which landlords had brought an action against a tenant of a house within the Rent Restriction Acts, claiming possession on the ground of non-payment of rent. The statement of claim set out the proviso for re-entry, and so on, and alleged that certain rent was in arrear, and the registrar of the county court made an order in the action for possession, the order to be suspended on payment of the current rent and the rent for two months named on a certain date. The county court judge dismissed the tenant's appeal, stating that it was vexatious. The point was then taken that the order did not properly comply, not with some provision in the Rent Acts, but with subsection (1) of section 180 of the County Courts Act, 1934. The judgment of Tucker L.J. in the note is to the following effect, so far as material. He said[16]: "It had "been contended for the tenant on the appeal that the registrar's "order was invalid for failure to conform with section 180 (1) (*b*) "of the Act of 1934 in that it ordered payment on May 5 of the "rent due, that was before the expiration of four weeks, and that "in any event judgment for possession was suspended so long as "the current rent was paid. There was, however, no indication "on the county court judge's note that any such point had been "taken before him. It was then argued that it was not necessary "that those points should have been taken before the judge "because the Rent Restriction Acts applied to the premises and "because the Court of Appeal had said more than once that it "was the county court judge's duty to satisfy himself, before he "made an order for possession of premises within the Acts, that "all the requirements of the Acts had been complied with. It "was not, however, suggested here that any requirement of the "Acts had not been complied with. That being so, the case

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[15] [1891] A.C. 325.

[16] [1948] W.N. 129, 130.

"did not fall within the principle on which the Court of Appeal "entertain a point not raised before the county court judge." Then, after a reference to certain rules, the judge finished his judgment as follows: "The matters shown by counsel's statement, to be in controversy between the parties only proved how "necessary it was that such a point as now raised should be "raised before the judge and that he should be asked to make a "note of it for the information of the Court of Appeal"; and the appeal was dismissed.

As I read that judgment, except in the limited cases which involve the question of compliance with the Rent Restriction Acts, the rule laid down by the House of Lords in *Smith* v. *Charles Baker & Sons* [17] is of universal application and, as I have already indicated, it seems to me that the note, as at present found in the Annual Practice, is not correct.

[His Lordship stated the facts and continued:] The main point made by the tenant (if it is open to him in this court) is that the giving up by him of possession automatically ended the statutory tenancy, and for that proposition reliance is placed on the well-known case in this court of *Brown* v. *Brash and Ambrose*.[18] According to him, upon the happening of that event, rent as such ceased; and if he had, as is now conceded that he had, failed to comply with the statutory obligation as to three months' notice in section 15 (1), all he did was to commit a breach of the statutory obligation as to notice, for which he would be liable for damages, and, being so liable, the landlords must, on general principles, mitigate the damages. That they failed to do.

I interpose here the trite observation that the conception of the statutory tenant is something of a novelty in our law. The word "rent," in its strict original implication, meant something issuing out of the land, and was therefore applicable to a case in which the tenant or a lessee had an interest or estate in the land. It is, however, clear that the word "rent" and the obligation to pay a periodical sum of money as "rent" is expressly preserved by Parliament in the case of a statutory tenant: see, for example, paragraph (*a*) of Sch. I to the Rent Restriction Act of 1933. To that matter I shall return presently; but the first question is whether this point in regard to mitigation of damages is open to Mr. Platts-Mills at all. There is no reference in the judge's judgment to it, and, if the point were taken (that is, that the only claim the landlords had was for damages and not for rent),

[17] [1891] A.C. 325.

[18] [1948] 2 K.B. 247.

then surely they would, at the hearing below, have sought an amendment of their plaint so as to ask in the alternative for damages. On the other hand, Mr. Platts-Mills has argued that there could have been no possible point on his part in calling two of the witnesses whom he did call save for the purpose of showing that there was a failure to mitigate damages. Having regard to the fact, as I have already stated, that there is no reference at all to this matter in the judgment and no material finding of fact, Mr. Platts-Mills candidly admits that he could not now ask for more than a reference back of this point on the ground that there was some evidence of failure on the plaintiffs' part to mitigate the damages. For my part, I very much doubt, on the principles that I have above mentioned, whether this point is in truth open to Mr. Platts-Mills in this appeal, but, having regard to the view I take (as will be seen), it is unnecessary formally to decide that matter.

There was, however, another point of some difficulty which arose, which it is also unnecessary to discuss at length, namely: What is the precise effect of a statutory tenant's "giving up "possession," without more? This is again a reference to the case of *Brown* v. *Brash*,[18] the effect of which is stated in Mr. Megarry's book, 6th ed., p. 176, where it is said: "It has been "said that 'There are, we think, only two ways by which a "'tenant, whose contractual tenancy has come to an end, can "'use the protection of the Acts. One is . . . by giving up "'possession. The other is by an order against the tenant for "'recovery of possession.'" But the mere fact that a tenant absents himself from the premises is obviously not, or not necessarily, enough, since he may come back the next day. On the other hand, if the landlords re-enter in fact, may there not have been a surrender or its equivalent, so as to end the tenant's liability for rent or for damages, or for whatever it be properly called, notwithstanding the absence of any notice on the tenant's part? The point, however, does not arise here, because I think it clear that there was nothing equivalent to surrender until November 20, 1951, the date of the subsequent letting. I think, therefore, the appeal fails on the first head or branch of the claim.

The next matter is to my mind more difficult. The question is: Was the tenant liable to pay the £40 stipulated for by clause 7 of the lease when, being then a statutory tenant, he left the premises in the autumn of 1951? It was first said on the tenant's part (and it was so pleaded) that this sum of £40 was a "penalty" and therefore would not be enforced by the courts. By that pleading I understand is meant that the sum in question was in the nature of a fine exacted on the happening of some event, or, more particularly, the breach of some obligation. In my judgment this sum was not a "penalty," as I understand the word. The obligation was to pay the sum of £40 "towards "redecoration," and it has not been suggested before us that the sum of £40 was an exorbitant figure. But it has also been argued before us that the obligation is not of a nature which could, or would, be carried over into the statutory tenancy, and this general point clearly was taken in the court below by Mr. Platts-Mills, for it is dealt with by the judge on the last page of his judgment.

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[18] [1948] 2 K.B. 247.

When the appeal was first before this court the argument proceeded on the basis that the obligation did bind the tenant when he became contractual assignee, so that as contractual assignee he would have been bound to pay £40 if the event occurred on which it became payable. After the argument had concluded, it seemed to us that the hypothesis that it did bind an assignee of the original tenant was open to some doubt, and the case was therefore restored for further argument, for, if the tenant were not bound to pay the £40 as assignee, it was obviously difficult to see how the obligation could be carried over into the statutory tenancy.

Once more the problem arises: Is the point that I have just mentioned open to Mr. Platts-Mills?—for, as such, I think he did not take it below. On the other hand, the point that the obligation could not be imported into the statutory tenancy was obviously taken and it is not easy to see how the latter point could properly be determined without consideration of the former. On the view I take, again it is (fortunately) unnecessary for me to express an opinion whether it was or was not open; and in any event the answer will be found on both points, I think, to turn largely on the construction of clause 7 of the lease. On the question, was the tenant bound by this obligation as a contractual assignee, I assume (notwithstanding an observation in Woodfall on Landlord and Tenant, 24th ed., p. 551) that it does not matter that there was here only an agreement under hand, and not a lease by deed, since the tenant took possession in fact under the agreement.

The law seems to be that a mere covenant by a lessee to pay a sum of money to the lessor will not prima facie "touch and "concern" the land and, therefore, will not run with the land. But such a covenant may be part and parcel of or bound up with other covenants, for example, a covenant to repair, so as to produce the opposite result. The covenants will then be "inextricably bound together": see, for example, *Moss' Empires* v. *Olympia (Liverpool) Ld.*[19]; see also *Lord Howard de Walden* v. *Barber*,[20] where the obligation in question was said to be "an "annexe to the general covenant"; see also the general discussion of the cases in Smith's Leading Cases, 13th ed., p. 51, and the case of *In re Hunter's Lease*,[21] where it was laid down that the question affecting such covenants is the same whether the covenants are covenants by a lessor or a lessee. Thus, if there were a covenant to repair and decorate and deliver up repaired and decorated, with a proviso that payment of the sum of £x (being a reasonable sum) should be paid (if demanded) in lieu and satisfaction of the latter part of the covenant, I should assume that the whole covenant would run with the land, and undoubtedly such a covenant would be convenient and, I think, sensible; but, as later appears, I am unable, for my part, to construe the present covenant so favourably to the landlords.

But if I am wrong so far (or if the point is not open to Mr. Platts-Mills and ought not to be considered) then the landlord's difficulties, in my judgment, are still by no means at an end. The character of the statutory tenancy, I have already said, is a very special one. It has earned many epithets, including "monstrum horrendum," and perhaps it has never been fully thought out by Parliament. It is clear, however, that purely personal covenants cannot persist into a statutory tenancy, for ex concessis the contract is finished (though, of course, the contracting party may still be sued as such). It is also clear that covenants to deliver up possession are inconsistent with a statutory tenancy, from which it would appear to me to follow that covenants to pay money "inextricably bound up with" covenants to deliver up possession would cease with the latter. There are other difficulties, including: (1) one statutory tenant may succeed another—for example, under section 12 (1) (*g*) of the Act of 1920—and (2) such a covenant, if it does persist into the statutory tenancy, would presumably become immediately

[19] [1939] A.C. 544.

[20] 19 T.L.R. 183.

[21] [1942] Ch. 124.

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enforceable if an order were made by the court under, for example, paragraph (*h*) of Sch. I to the Act of 1933. I therefore feel the gravest doubt whether, on the most favourable construction possible to the landlords of clause 7, it could survive into the statutory tenancy. But, in any case, what does the covenant in clause 7 mean? It bristles, to my mind, with difficulty and obscurity.

[His Lordship proceeded to consider the construction of the tenancy agreement of 1945 and held that clause 7 was too confused to create in favour of the landlords a right to the sum of £40 and, on the broad ground that the plaintiffs had failed to discharge the onus of satisfying him that the tenant owed them £40, his Lordship would allow the appeal on the second point.]

Denning L.J. By an agreement under hand dated March 7, 1945, Mrs. Bowyer and others let to Mrs. Crossley a flat in Kensington for three years from February 8, 1945, at a rent of £175 a year. The agreement contained a clause by which the tenant agreed to repair and another clause by which she agreed that, when she left at the end of the three years, she would pay £40 towards re-decoration.

Shortly before the three years expired, Mrs. Crossley assigned the last nine days of the term to the tenant and he entered into possession of the flat. The term expired on February 8, 1948, and thereafter the tenant stayed on as a statutory tenant. In August, 1951, he bought another house and wanted to leave the flat, but he did not give the requisite three months' notice to quit. He left the flat on August 30, 1951, and sent the keys to the landlords on September 29, 1951, but the landlords did not accept a surrender of the tenancy. They tried to relet the flat and eventually succeeded in doing so as from November 21, 1951.

The first question is whether the landlords are entitled to rent up to the time they relet. I think they are. As a statutory tenant, the tenant was not entitled to give up possession except on giving not less than three months' notice to quit (see section 15 (1) of the Act of 1920) and that means a valid notice: see *King's College, Cambridge* v. *Kershman*.[22] He did not give any valid notice. He went out of possession, it is true, and thereupon the landlords would have been entitled to recover possession, if they had so wished. But they did not so wish. They were not bound to accept possession whenever the tenant chose to offer it. They were entitled to hold him to the tenancy until he gave a valid three months' notice to quit. Very sensibly they did try to relet; and, as soon as they relet, the statutory tenancy came to an end by surrender by operation of law. But until it came to an end by valid notice to quit or by surrender, they were entitled to hold the tenant liable for rent.

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[22] 64 T.L.R. 547.

The second question is whether the tenant is liable to pay £40 towards redecoration. This raises several matters upon which my views are as follows: (1) The agreement to pay £40 was not a penalty. It was a very convenient provision whereby the parties agreed that the tenant Mrs. Crossley should pay a lump sum of £40 instead of paying damages for fair wear and tear. The reason for such a provision is fairly plain. When an outgoing tenant leaves the premises, he does not in practice do any decorative repairs, even though the tenancy agreement says that he should. He usually pays the landlord an agreed sum instead of doing the decorations. This suits both sides. It suits the outgoing tenant because he avoids the cost of a survey to ascertain the dilapidations. It suits the landlord because he has to redecorate before a new tenant goes in, and the sum will help towards the cost. Such being the practice, the parties in the present case simply agreed the sum in advance. They agreed in advance that a sum of £40 should be payable by the tenant at the end of the term for everything except "unfair wear and "tear," leaving unfair wear and tear, if any, to be assessed and paid for separately. I see nothing wrong but everything to the good in so doing. The parties know in advance exactly where they stand. The sum is not a penalty, but an agreed payment in lieu of damages. (2) The agreement to pay £40 does, in my opinion, touch and concern the thing demised. It concerns the redecoration of the flat. It is true that the landlord is not bound in law to apply the £40 towards redecoration, but he will, as a matter of practice, so apply it. The case falls within the authority of *Vernon* v. *Smith*,[23] *Lord Howard de Walden* v. *Barber*[24] and *Moss' Empires Ld.* v. *Olympia (Liverpool) Ld.*[25] (3) Seeing that the agreement touched and concerned the thing demised, it ran with the land so as to bind the assignee, the tenant, as soon as he entered into possession. I know that before the Judicature Act, 1873, it was said that the doctrine of covenants running with the land only applied to covenants under seal and not to agreements under hand: see *Elliott* v. *Johnson*.[26] But since the fusion of law and equity, the position is different. The distinction between agreements under hand and covenants under seal has been largely obliterated. There is no valid reason nowadays why the doctrine of covenants running with the land—or with the reversion—should not apply equally to agreements under hand as to covenants under seal; and I think we should so hold, not only in the case of agreements for more than three years which need the intervention of equity to perfect them, but also in the case of agreements for three years or less which do not. (4) When the term of three years came to an end, the tenant remained on as statutory tenant, subject to all the terms and conditions of the original contract of tenancy "so far as the same are consistent with the provisions of this Act." In my opinion, the agreement to pay £40 was incorporated into the statutory tenancy. I see nothing in the clause which is inconsistent with the provisions of the Act except possibly the words "at the end "of the term." This phrase is, I think, synonymous with the phrase "at the end of the tenancy." The clause itself uses the two phrases interchangeably. The clause could not and did not operate "at the end of the term" of three years, because the tenant did not then quit the premises. But why should it not operate at the end of the statutory tenancy when he does quit? I see no reason why not. If the clause did not operate at the end of the statutory tenancy, it would mean that the tenant would escape payment of the £40 altogether and, what is more, he would not have the benefit of it. It seems to me clear that if the tenant stays on by right, either on a contractual holding over or as a statutory tenant, he is liable, on quitting the premises, to pay the £40.

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[23] 5 B. & Ald. 1.

[24] 19 T.L.R. 183.

[25] [1939] A.C. 544.

In the result, I think myself in agreement with the county court judge on all points, and I would dismiss the appeal.

ROMER L.J. In my opinion the appeal should be dismissed. With regard to the sum of £78 11s. 11d. awarded to the landlords in respect of arrears of rent due down to November 20, 1951, I have little to add to what my brethren have said. The tenant argued before us that any sum that might be recoverable from him after he abandoned possession of his flat could not be regarded as rent but as damages for breach of his obligation to give three months' notice to quit. I am not satisfied that he did not continue liable for rent as such. The point is, however, immaterial, for the amount of damages payable by him for failing to give the proper notice would be quantified by the amount of rent that he would have had to pay if he had continued in possession, and the tenant's argument to the effect that the landlords could have mitigated the damages seems to me to be without foundation. It was sought to base the argument on the footing that the landlords ought, at the earliest opportunity, to have relet the flat at a rack rent, as he had done before, instead of waiting until he could find a tenant who was willing to pay a capital premium but a lower rent. A tenant who goes out of possession without giving due notice has no right to dictate to his landlord how he shall deal with his property; and why the landlords here should have disposed of the flat in a manner disadvantageous to themselves in order to save the tenant from the full consequences of his wrongful act I am at a loss to conceive.

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[26] (1868) L.R. 2 Q.B. 120.

[His Lordship then proceeded to consider the construction of the tenancy agreement and held that the undertaking to pay £40 at the end of the term was an obligation binding on Mrs. Crossley, the original tenant. He then continued:] On the view above expressed that the agreement to pay the £40 would have been binding upon Mrs. Crossley had she continued in possession, I am of opinion, for the reasons stated in the judgment of Denning L.J., that the covenant ran with the land so as to bind the tenant as assignee of the term and that it continued to operate as a term of his statutory tenancy. As to the latter point I would add that a contrary decision might operate very hardly on a landlord at the instance of an unconscientious tenant; for a covenant to pay a sum of money in respect of dilapidations at the end of a contractual tenancy which imposed no express obligation to repair could be readily avoided by the tenant remaining on as statutory tenant and giving notice to quit immediately afterwards.

The tenant cannot, in my opinion, escape liability on the ground that clause 7 provided that the sum was only payable on the tenant quitting " at the end of the term granted " by the agreement. That phrase meant no more than quitting on the expiration of the tenancy, as is shown a few lines later on in clause 7 itself; and in other provisions of the agreement, in each of which the word " tenancy " is used as the equivalent of " the " term hereby granted."

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Warbey.

As already indicated, the appeal, in my opinion, fails and should be dismissed.

Appeal dismissed.

Solicitors: *Silverman, Miller & Fraser; Coode, Kingdon, Cotton & Ward.*

B. A. B.

1951
June 27 *to*
July 17;
July 30.

Devlin J.

C. A.
1952
Oct. 6, 7, 8;
Nov. 3, 4.

Evershed M.R., Denning and Romer L.JJ.

BANK VOOR HANDEL EN SCHEEPVAART N.V. *v.* SLATFORD AND ANOTHER.

[1950, B. No. 3010.]

International Law—Foreign legislation transferring movable property in England—Whether enforceable in England—Decree of allied government in London—Public policy.

Trading with the Enemy—Peace Treaty—Hungary—Charge on property "belonging to" or "held or managed on behalf of" Hungarian national — One-man company — All shares held by Hungarian national — Whether charge imposed — Treaty of Peace (Hungary) Order, 1948 (*S.I.* 1948, *No.* 116), *art.* 1 (2), (3), (5) (*g*)—*Trading with the Enemy Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *s.* 7.

Crown Prerogative—Custodian of enemy property—Income of investments of property made by the custodian not exempt from tax.

Before the war of 1939 to 1945 a bank, a Dutch limited company, deposited a quantity of gold in the course of their ordinary business with a safe deposit in London. In May, 1940, the Netherlands were invaded by the enemy, and on May 20 they became enemy territory for the purposes of the Trading with the Enemy Act, 1939. The bank retained their commercial domicile in the Netherlands. Thereafter the Royal Netherlands Government, with the approval of the British Government, exercised their sovereign powers from London. On May 24, 1940, they issued a decree, known as the A.1 decree, with the object of preventing property belonging to persons resident in occupied Netherlands from being used in a way which was incompatible with the interests of the Netherlands, which purported to transfer such property to the State for as long as might be necessary.

On July 3, 1940, the Board of Trade made a vesting order under section 7 of the Trading with the Enemy Act, 1939, transferring the gold to the Custodian of Enemy Property for England and Wales. On July 22 a further order gave to the custodian power to sell the gold. On July 24 the custodian sold the gold for nearly two million pounds. On May 19, 1950, the Netherlands Government made an order returning the property in the gold to the bank.

The bank claimed against the custodian in conversion the present value of the gold bars, on the ground that the orders of July, 1940, were invalid since the property in the gold was then in the Netherlands Government by virtue of the A.1 decree:—

Held, that the A.1 decree was ineffective to transfer movable property in this country to the Netherlands Government; that the orders of July, 1940, under the Trading with the Enemy Act were accordingly valid; and that the custodian was not therefore liable to the plaintiff bank.

As a general rule the lex situs governs the transfer of movables. Prima facie, therefore, a decree of a foreign government will not be effective to transfer property situated in this country, and no distinction is to be drawn between decrees which are confiscatory in their nature and those which are not: if a decree of a foreign country purports to have extraterritorial effect and to attach property situated in this country at the time when it is made it will not be recognized by English law and English courts. Considerations of public policy for which no precedent exists cannot be invoked to determine whether a particular decree belongs to a special category forming an exception to the general rule.

Lorentzen v. *Lydden and Co. Ld.* [1942] 2 K.B. 202 and *O/Y Wasa S.S. Co. Ld. and Another* v. *Newspaper Pulp and Wood Export Ld.* (1949) 82 Ll.L.Rep. 936 not followed.

Government of the Republic of Spain v. *National Bank of Scotland Ld.*, 1939 S.C. 413 (63 Ll.L.Rep. 330, sub nom. *The El Condado*) followed.

At the material time all the shares in the bank were owned by a Hungarian national, and on April 6, 1950, the custodian transferred the capital sum representing the proceeds of the sale of the gold to the Administrator of Hungarian Property, who claimed that it was property subject to the charge imposed by article 1 (5) of the Treaty of Peace (Hungary) Order, 1948, as being property for the time being "belonging to or held or managed on behalf of" a Hungarian:—

Held, that there was nothing in the scope of the treaty or order as a whole which could be regarded as affecting the rule of law that the property of a company was neither the property of the shareholders, nor held or managed by the company on behalf of its shareholders, and accordingly the bank was entitled to recover that sum from the administrator.

It was conceded by the custodian and the administrator that as a result of this decision the bank was also entitled to recover the income which the investments made by the custodian of the proceeds of the sale of the gold had earned. The bank contended that the custodian had Crown status and accordingly was not liable to pay income tax and therefore the accumulated income should be paid over without any deduction in respect of income tax. Devlin J. accepted that contention. On appeal:—

Held, first, that the office of Custodian of Enemy Property was not such as of itself to confer upon its holder the immunity from

Reversed in part 1954 AC P. 584.

tax belonging to the Crown. Secondly, that during the period of retention of the gold or its proceeds by the custodian the rights and interest of the bank were not wholly extinguished. By virtue of the provisions of the Trading with the Enemy Act, 1939, and the orders made thereunder such rights were in statutory suspense, that was to say they could not during the war be presently asserted and enforced. The beneficial interests of the bank were liable to be wholly defeated and extinguished, but pending any order to that effect they persisted throughout the period of the custodian's retention. The preservation of the interests of the bank in the proceeds of sale in question, however remote their character, made it impossible to say that the sums were held exclusively for public purposes. The custodian held the sums in question for purposes of preservation defined in the Act of 1939. Thirdly, that the deduction of tax did not touch or affect the personal or prerogative rights of the Crown and such deduction was rightly made.

Per Denning L.J.: Crown immunity depends not only on whether the person in receipt of the income has Crown status, but also on whether the activity in question is a Crown activity. Moreover, the activity must be such that Crown purposes would be prejudiced unless immunity were afforded to it.

Per Romer L.J.: The income cannot qualify for immunity from tax, unless it can be shown that it was applicable for the purposes of the Crown—for public purposes. Income so applicable is exempt from income tax, whatever be the status of the recipient and, on the other hand, income received by any servant of the Crown, but not so applicable is chargeable to tax, notwithstanding the status of the person who receives it.

The principle laid down in *Coomber* v. *Berkshire Justices* (1883) 9 App.Cas. 61 applied.

The observations of Russell J. in *In re Münster* [1920] 1 Ch. 268, 278, 279 approved.

Administrator of Austrian Property v. *Russian Bank for Foreign Trade* (1932) 48 T.L.R. 37 distinguished.

Decision of Devlin J. reversed.

ACTION.

The plaintiffs, Bank Voor Handel en Scheepvaart, were a Netherlands limited company which, so far as material, had all the legal characteristics of a British limited company, and carried on a normal banking business. It was incorporated in 1918. Baron Heinrich Thyssen-Bornemisze (hereinafter referred to as "the baron"), a Hungarian national, domiciled in Switzerland from 1932 onwards, owned directly or indirectly all the shares in the bank from 1936 until his death. He died on June 26, 1947, when 62½ per cent. of his estate went to his youngest son (hereinafter called Baron Heini), also a Hungarian national, and 12½ per cent. to each of his other three children, who were not

Hungarian nationals. It was disputed, however, whether the portions of the other three children vested in them immediately as co-heirs of Baron Heini or not.

The following statement of facts is taken from the judgment of Devlin J.:—The plaintiff bank before the 1939/1945 war, as part of its ordinary business, deposited with the City Safe Deposit in London a quantity of gold bars, of some two million pounds sterling in value. The gold was there at the outbreak of war on September 3, 1939, when the Trading with the Enemy Act, 1939, came into force. The custodian appointed under the Act was aware of this deposit of gold, which he supposed erroneously to belong to the German family of Stinnes. He had some communication with the City Safe Deposit about it in September, 1939, but he took no action then.

In May, 1940, the Netherlands were invaded, and on May 20 they became enemy territory. The plaintiff bank retained its commercial domicile in Holland, and thus at once acquired, and during the war never lost, enemy character on that ground. In addition to its property in the gold, there was due to it on May 20 from various banks in London sundry balances amounting in all to £17,682 17s. 8d. The Royal Netherlands Government thereafter, with the approval of the British Government, exercised their sovereign powers from London. On May 24, 1940, they issued a decree (hereinafter referred to as the A.1 decree) containing special provisions regarding property belonging to persons resident in occupied Netherlands. Its object was to prevent such property from being used in a way which was incompatible with the interests of the Netherlands, and for that purpose to cause it to be entrusted to the State for so long as might be necessary.

On July 3, 1940, the Board of Trade, under the Trading with the Enemy Act, 1939, s. 7, made a vesting order transferring the gold to the custodian on the ground that the bank was a Netherlands company. On July 22 a further order gave the custodian a power of sale. On July 24 the custodian sold the gold for the sum of £1,984,120 15s. 5d. and retained the proceeds as enemy property. The bank balances due to the plaintiff bank from various banks in London were not transferred to him until long after the conclusion of hostilities.

On December 7, 1941, the United Kingdom and Hungary became at war with each other; Hungary had in fact been enemy territory for the purpose of the Trading with the Enemy Act, 1939, since April 8, 1941.

On October 2, 1944, the Government of the United Kingdom and the Government of the Netherlands entered into an agreement (hereinafter referred to as "the property agreement") which provided that certain property held under the Trading with the Enemy legislation should be transferred to the Netherlands Government—namely, property which "falls within the defini-"tion of enemy property contained in the United Kingdom "Trading with the Enemy legislation and belongs to persons or "bodies of persons who are and have been 'enemies' within the "meaning of the Trading with the Enemy Act solely because "they are and have been resident or carrying on business in "Netherlands territory in Europe on and since May 15, 1940." Under the agreement a committee was set up to determine what was Netherlands property and what was not. This committee did not begin to function until some time after the end of hostilities.

The Treaty of Peace between Hungary and the United Kingdom was concluded on February 10, 1947. It provided by article 29 (1) that the United Kingdom should have the right to seize, retain and liquidate all property, rights and interests which were then within its territory and belonged to Hungarian nationals, and to apply such property or proceeds to such purposes as the United Kingdom might desire within the limits of its claim against Hungarian nationals, any excess to be returned. By article 29 (3) the Hungarian Government was to compensate Hungarian nationals whose property was taken under this article and not returned to them. By article 29 (5) (*c*), however, the property of Hungarians resident in United Nations territory was not in general to be seized. On April 29, 1947, the Treaties of Peace (Italy, Roumania, Bulgaria, Hungary and Finland) Act, 1947, to provide for carrying into effect the Hungarian treaty, among other treaties, received the Royal assent. It provided that Orders in Council might be made to carry out the treaties and to give effect to any of their provisions. The treaty with Hungary came into operation (it had been subject to ratification) on September 15, 1947.

On January 26, 1948, the Treaty of Peace (Hungary) Order, 1948, was made to take effect from February 2, 1948. By this order, article 29 of the treaty was given effect as law. The order set up the office of Administrator of Hungarian Property, and provided that all property, rights or interests to which the order applied were to be charged with the amounts due at the date when the treaty came into force in respect of claims against the

Government of Hungary or Hungarian nationals. On February 3, 1948, by the Trading with the Enemy (Enemy Territory Cessation) (Hungary) Order, 1948, art. 1, made under the Trading with the Enemy Act, 1939, Hungary ceased to be enemy territory.

Meanwhile, on November 6, 1947, the committee set up under the property agreement held its first meeting. As the result of its deliberations a black list was drawn up by the Trading with the Enemy Department of assets which were not to be released without previous investigation as to enemy interests. The property in question in this case was included in this list as being among the cases in which there was prima facie evidence of substantial enemy interests. It was still at that date erroneously supposed by the Trading with the Enemy Department that some German interest was concerned.

From the end of hostilities until July, 1948, the bank was under Dutch Government control. On July 22, 1948, shortly after the control was removed, the bank's solicitors wrote to the Administration of Enemy Property Department requesting that the assets should be released. After a very long delay the request was refused; and on April 6, 1950, the administrator, pursuant to article 1 (5) (*e*) of the Treaty of Peace (Hungary) Order, 1948, required the custodian to transfer the proceeds of the sales and of the bank balances to him. He supported that demand by a certificate, issued under article 1 (5) (*g*) of the order, that the property was subject to the charge imposed by the order. Accordingly the custodian paid to the administrator £1,962,852 14s., having deducted a fee of approximately £40,000, which he (the custodian) was authorized to deduct under article 7 of the Trading with the Enemy (Custodian) Order, 1939.

On May 19, 1950, the Netherlands Government made an order making restitution to the plaintiff bank of the property taken under the A.1 decree, and transferring and assigning that property to it. On the same date the bank demanded from the custodian and the administrator that the property should be transferred to it, and on that demand being refused, on June 12, 1950, the bank issued the writ in the present action.

The plaintiff bank claimed against the Custodian of Enemy Property (the first defendant), in conversion, the present value of the gold bars, and against the Administrator of Hungarian Property (the second defendant) the amount paid to him by the custodian, on the ground that it was not within the charge imposed by the Treaty of Peace (Hungary) Order, 1948.

Sir Walter Monckton, K.C., John Foster, K.C., and *Mark Littman* for the bank submitted, in the claim against the custodian, that the bank was entitled to the present value of the gold bars, on the ground that the orders made in July, 1940, were invalid because, at that date, the gold was not enemy property, but, by virtue of the A.1 decree, the property of the Netherlands Government.

As regarded the claim against the administrator, it was submitted that the bank was entitled to recover the money paid to him by the custodian under the Treaty of Peace (Hungary) Order, 1948, art. 1 (5) (*g*), on the ground that it was not properly subject to the charge imposed by the order.

Sir Lynn Ungoed-Thomas, S.-G., Gerald Upjohn, K.C., J. P. Ashworth and *R. J. Parker* for the custodian submitted that, as regarded the claim against the custodian, although the A.1 decree, subject to its enforceability by the courts of this country, was a valid exercise of the sovereign power of the Netherlands Government effective to transfer the property in the bars to the State of the Netherlands on May 24, 1950, the English courts would not enforce the decree since they would treat it as having no extraterritorial effect.

As regarded the claim against the administrator, it was submitted that the property in question was subject to the charge.

Cur adv. vult.

July 30, 1951. DEVLIN J. stated the facts set out above and continued:—The object of the property agreement of October 2, 1944, between the governments of the United Kingdom and the Netherlands, was to reconcile the A.1 decree with the Trading with the Enemy legislation. The Solicitor-General is, I think, right in saying that the agreement is not justiciable, and that neither its language nor that of its accompanying letters is suited to legal interpretation. I shall not find it necessary to decide whether, either in the spirit or in the letter, it required the British Government to hand over the assets of the bank; the British Government, whether justifiably or not, I assume took the view that it did not.

It was not the object of the Treaty of Peace between Hungary and the United Kingdom to catch the property of all Hungarians resident outside Hungary. But the exclusion of the property of Hungarian nationals permitted to reside in United Nations territory by article 29 (5) (*c*) would not apply to the property of a

Hungarian national resident in a friendly neutral country such as Switzerland. Accordingly that situation was covered by a direction to release made under the Treaty of Peace (Hungary) Order, 1948, and of the same date as the order itself, by which all property of a Hungarian national resident in non-enemy territory was released from the charge imposed by that order, other than property which had been subject to a vesting order under section 7 of the Act of 1939. The property of the baron (the administrator's case being that he was the real owner of the bank's assets) would have qualified for this release, but for the fact that in July, 1940, before England was at war with Hungary, a vesting order was made upon it when the Board of Trade were under the mistaken impression that it belonged to a German. The Solicitor-General has quite rightly pointed out that a Hungarian vesting order, if I may so put it, might on his case have been made at any time after April, 1941, but would then have been superfluous because of the Dutch vesting order already in existence. It was, however, in practice only in very exceptional cases that vesting orders were made on the property of Hungarians not resident in Hungary. I do not know whether this is thought to be one of those exceptional cases (if it is, it would be improper for me to inquire about the reasons for that conclusion) or whether an anxiety to retain by hook or by crook so large a sum as £2,000,000 has moved the authorities to seize upon any technicality that will help towards that end. Their silence in the matter (for this is another point upon which the Solicitor-General's instructions have not enabled him to shed any light) leaves their attitude open to either construction. Vast powers of this sort, which are almost quasi-judicial in character, are nowadays entrusted to government departments; in wielding them they might bear in mind the judicial maxim that justice should not only be done but should appear to be done. If this be a just and proper exercise of discrimination against the real enemies of Britain, it is, I think, unfortunate that it should come before the court as equally explicable as an attempt by the Board of Trade to collect the unexpected and profitable fruits of a vesting order made perhaps in error and certainly for a different purpose.

It is not disputed that, under both Dutch and English law, subject to the effect of the Trading with the Enemy and Treaty legislation, the ownership of the gold and the bank balances was vested in the bank from May 19, 1950, when the Netherlands Government made the order making restitution to the plaintiff bank of the property taken under the A.1 decree.

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The property is now in the hands of the administrator. He obtained it by virtue of a demand made under the terms of the Treaty of Peace (Hungary) Order, 1948, and of a certificate issued in accordance with that order. Article 1 (5) (*g*) of the order provides: "A certificate by the administrator that any property, "rights or interests are subject to the charge shall be prima facie "evidence of the facts stated in the certificate, and where any "requirement or demand for payment by the administrator as "aforesaid is accompanied by such a certificate, the person in "possession of the property transferable by delivery, or the "person by whom a sum of money is due, shall comply with the "requirement or demand and shall not be liable to any action "or legal proceeding in respect of such compliance; but if it is "subsequently proved that the property, rights or interests were "not subject to the charge, the owner thereof shall be entitled "to recover the same from the administrator, or if it has been "sold, the proceeds of sale, but not to any other remedy." Accordingly no claim, except that authorized by this paragraph, can be made against the administrator. The plaintiffs have undertaken the burden of proving that the property was not subject to the charge, and that is one of the two main issues which I have to try. The administrator at one time contended that the bank could not in any event recover the property from him, since because of the vesting order of July 3, 1940, the custodian was "the owner" to whom under paragraph 5 (*g*) the property should be returned. The Solicitor-General has stated that in the particular circumstances of this case the contention will not be pressed; I presume that if the property did go back to the custodian free of the charge it would eventually be restored to the plaintiffs by way of the property agreement.

The claim under the Treaty of Peace (Hungary) Order, 1948, is against the administrator and cannot be for more than the proceeds and, possibly, interest thereon. The plaintiffs' larger claim is in the alternative against the custodian for conversion, and consists in the main of the present value of the gold bars; the value has increased since the sale in 1940 because of the devaluation of sterling. This is the other main issue I have to determine. The plaintiffs say that the orders made in July, 1940, under the Trading with the Enemy Act were invalid because at that date the property was not enemy property, but, by virtue of the A.1 decree, the property of the Netherlands Government. The substantial question raised is, therefore, whether the A.1 decree was effective to transfer property situate in this country.

I shall take first the argument on the A.1 decree. The custodian submits that the English courts will not enforce it since they will treat it as having no extraterritorial effect. The plaintiffs' submission is that the general rule is to the contrary, and that the legislation of a foreign State affecting the title of its nationals to movables in England will be applied by the English courts unless, first, the legislation is contrary to public policy—as, for example, confiscatory or penal legislation—or, secondly, its application would infringe English legislation. Alternatively, the plaintiffs submit that, if it be the general rule that foreign legislation is not enforceable, then the decree falls within an exceptional category.

I think it is convenient to begin by considering what is the general principle of our law with regard to foreign legislation affecting property within our territory. There is little doubt that it is the lex situs which as a general rule governs the transfer of movables when effected contractually. The maxim mobilia sequuntur personam is the exception rather than the rule, and is probably to be confined to certain special classes of general assignments such as marriage settlements and devolutions on death and bankruptcy. Upon this basis the A.1 decree, not being a part of English law, would not transfer the property in this case. But decrees of this character have received in the authorities rather different treatment. Although there is not, as far as I am aware, any authority which distinguishes general legislation, such as part of a civil code, from ad hoc decrees, the effectiveness of such decrees does not appear on the authorities to be determined exclusively by the application of the lex situs. Apart from two recent cases on which the plaintiffs greatly rely, there has been no case in which such a decree has been enforced in this country, but the grounds for refusing effect to them have been variously put. Sometimes it is said that the decree is confiscatory. In the textbooks it is said sometimes that as a matter of public international law no State ought to seek to exercise sovereignty over property outside its own territory, and therefore the principle of comity is against enforcement; and sometimes it is said that the principle of effectiveness is against enforcement, since no State can expect to make its laws effective in the territory of another State. Dicey, Conflict of Laws, 6th ed., p. 13, states: "A State's authority, in the eyes of other States and the courts "that represent them, is, speaking very generally, coincident "with, and limited by, its power. It is territorial. It may "legislate for, and give judgments affecting, things and persons "within its territory. It has no authority to legislate for, or "adjudicate upon, things or persons not within its territory."

The Solicitor-General has argued on principle that no foreign legislation, whether confiscatory or not, can be allowed to affect property in this country. It is beyond dispute that confiscatory legislation will not be allowed to do so, and the Solicitor-General contends that the distinction between confiscatory and non-confiscatory is not a satisfactory one. In *Tallinna Laevauhisus* v. *Tallinna Shipping Co. Ld.*[1] legislation which provided for compensation amounting to 25 per cent. of the value was held to be confiscatory. Presumably any decree which did not provide for full compensation would be held to be confiscatory. Now that decrees involving State acquisition and requisition are comparatively common, it may not be easy to ascertain whether full compensation is provided for or not. The Compensation (Defence) Act, 1939, places certain limits on the amount of compensation: for example, no account is to be taken of any appreciation in value due to the war. While that is doubtless a healthy rule for British nationals, it might well result in a neutral getting less than the full value of his goods. If a decree, such as the A.1 decree, contemplates that the property taken is to be preserved for the benefit of its owners and to be returned to them at the conclusion of the war, but contains no legal obligation to that effect, is the hope and expectation that the subject will get his property returned to him sufficient to save it from being confiscatory?

There are other considerations of principle which can be advanced in support of the defendants' argument. First, in the construction of our own statutory legislation we accept the principle that, unless the contrary is made clear, an Act of Parliament is not intended to have extraterritorial effect. Secondly, the principle as submitted by the defendants is in harmony with the principle which favours the lex situs generally. Thirdly, if extraterritorial effect is given to foreign property legislation, it can only be at the expense of English law affecting the same subject-matter.

This seems to me a point worth detailed consideration. The plaintiffs do not suggest that such legislation could override the express provisions of an Act of Parliament. But while it is easy to concede that some limits would have to be imposed, it is not so easy to define what they should be. No foreign legislation

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[1] (1867) 2 Ch.D. 55, 60.

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could have any effect at all unless the common law, by which ordinarily rights of property are governed, was subordinated to it. I know of no authority for distinguishing in this respect between the common law and statute. Some codifying statutes are merely declaratory of the common law. Moreover, a statute can be affected although its provisions are not expressly overridden. In *Rex* v. *Paddington and St. Marylebone Rent Tribunal, Ex parte Bedrock Investments Ld.*,[2] and *Rex* v. *Fulham and Kensington Rent Tribunal, Ex parte Marks*,[3] if I may pick out a recent example of this, the Furnished Houses (Rent Control) Act, 1946, was said to " affect " the Rent Acts because they interfered with the scheme of control which the latter Acts set up.

For an example of the sort of interference of this type which foreign legislation might cause, it is unnecessary to go further than the present case. On May 20, 1940, the plaintiffs' gold became subject to the control imposed by the Trading with the Enemy Act. A vesting order might be made whenever the Board of Trade thought fit; and meanwhile article 4 of the Trading with the Enemy (Custodian) Order, 1939, provided: " No person shall, " without the consent of the Board of Trade, save as directed " by this order transfer, part with or otherwise deal with the " property of any enemy." The A.1 decree unwittingly snatched the gold from under the custodian's hand.

The conflict might not always be so direct as that. At the beginning of the war all goods were made subject to requisition by the British Government. Should the courts allow that object to be defeated by the legislation of allied or neutral governments endeavouring to further their own war efforts or safeguard the property of their subjects? Could neutral legislation be allowed, for example, to nullify the prerogative right of angary? The plaintiffs submit that these problems can be solved by the application of some principle of public policy. I shall have to consider later that suggested solution; for the moment I say no more than that any rider of the " unruly horse " must feel himself very firmly in the saddle before he undertakes to drag any number of foreign decrees through the thickets of our domestic legislation.

There is one more consideration under this head. Our own statutes may sometimes conflict, but they are at least designed to fit in with each other. Foreign legislation cannot be so designed, and it will generally be founded on a basis of property law very different from our own. Our statute law has evolved rules of construction for settling differences as between instruments of equal efficacy, as, for example, generalia specialibus non derogant; but these would not help to decide how much room was to be given to subordinate legislation. In short, a principle of private international law that allows property legislation to operate in the territory of another country, so far from being a principle which resolves the conflict of laws, will create a conflict which it will require the formulation of a new system to settle. There seems to me to be every reason, if the authorities permit it, for giving effect to the simple rule that generally property in England is subject to English law and to none other.

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[2] [1948] 2 K.B. 413.

[3] [1951] 2 K.B. 694.

There are three comparatively recent authorities in point. In *Lorentzen* v. *Lydden & Co. Ld.*[4] Atkinson J. decided that a decree of the Royal Norwegian Government acquiring, in return for compensation, property of its subjects in England was effective to transfer such property to the Norwegian Government. In *O/Y Wasa Steamship Co. Ld.* v. *Newspaper Pulp and Wood Export Ld.*[5] Morris J. followed this decision and applied it to the decree A.1 which I have to consider in this case. In both these cases the property concerned was a claim for damages for breach of a charterparty. The latter case involved a great number of points, and I am told by counsel concerned in the case that the principle in *Lorentzen* v. *Lydden & Co. Ld.*[6] was not much debated. The main authority on which the plaintiffs rely is therefore *Lorentzen* v. *Lydden & Co. Ld.*[6] I think that that case is directly in point; I am unable to distinguish it upon the ground suggested—namely, that the point that the decree was in conflict with the Trading with the Enemy legislation was not expressly taken in argument. The defendants rely mainly on *Government of the Republic of Spain* v. *National Bank of Scotland Ld.* (*The El Condado*),[7] a decision of the Inner House of the Court of Session and therefore of high persuasive authority. The court was considering a claim by the Spanish consul to the possession of a Spanish ship which he had sought to requisition while she was at Glasgow in accordance with powers granted by a Spanish decree. It does not appear from those parts of the decree set out in the report whether it provided for compensation or not, but it is clear that it was not treated by the court as confiscatory. The Scottish court refused to enforce the decree. The plaintiffs are unable to distinguish this case from *Lorentzen* v. *Lydden & Co. Ld.*[8] or from the present case except by saying that different considerations of public policy are involved.

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[4] [1942] 2 K.B. 202.

[5] (1949) 82 Ll.L.Rep. 936.

[6] [1942] 2 K.B. 202.

[7] 1939 S.C. 413; (1939) 63 Ll.L. Rep. 330, sub nom. *The El Condado.*

[8] [1942] 2 K.B. 202.

In *Lorentzen* v. *Lydden & Co. Ld.*[8] Atkinson J. surveyed the earlier authorities in order to arrive at his conclusion that there was no general rule preventing him from enforcing the Norwegian decree. I do not find it entirely clear whether he held that all foreign property legislation was enforceable unless contrary to public policy, or that the general rule excluded all such legislation, subject to certain exceptional categories, within one of which the Norwegian decree fell. I shall examine the cases to see if any general rule can be extracted from them.

It is of course true, as Atkinson J. points out, that these authorities did not necessarily involve a decision on the principle which I am here considering. Most of them could have been decided the way they were either on that ground or on the ground that the decrees were confiscatory. If any of these authorities were binding on me, it would be necessary to ascertain what was the ratio decidendi in each case. But since none of them are, I do not think it is profitable to examine the judgments minutely in order to determine, if I can, which part of the reasoning was decisive. What I propose to do is to ascertain whether there are any dicta, obiter or otherwise, which clearly show that the author was relying as part of his reasoning upon the principle of the lex situs, irrespective of the construction of the decree or of its confiscatory character. I think that there are. The dicta in *Lecouturier* v. *Rey*[9] are not conclusive, but they point in that direction. It is plain from Lord Macnaghten's speech[10] that his statement of the principle was not dependent on the construction of the decree. But the decree was confiscatory and it may be that the statement of principle should be treated as restricted to that type of decree, although there is nothing in the language which either he or Lord Loreburn L.C. used to suggest that. Lord Macnaghten said[10]: "It must be beyond the power of any "foreign court or any foreign legislature to prevent the monks "from availing themselves in England of the benefit of the reputation which the liqueurs of their manufacture have acquired "here or to extend or communicate the benefit of that reputation "to any rival or competitor in the English market." Lord Loreburn L.C. said[11]: "This property (for property it is) which "has come in question in this appeal is property situated in

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[8] [1942] 2 K.B. 202.

[9] [1910] A.C. 262.

[10] Ibid. 265.

[11] Ibid. 273.

"England, and must therefore be regulated and disposed of in "accordance with the law of England."

In *Sedgwick Collins & Co.* v. *Rossia Insurance Co. of Petrograd* [12] Sargant L.J., referring to Russian nationalization decrees, said [13]: "Effective as such legislation may be within the limits "of Russian territory, it cannot determine the ownership of "property locally situate in this country, such as debts owing "from debtors here: see Dicey, Conflict of Laws, 2nd ed., p. 310, "and *Lecouturier* v. *Rey*.[14]" The reference to Dicey is not to the passage cited earlier in this judgment of mine, but in support of the contention that debts are locally situate in the country of the debtor.

In *The Jupiter (No.* 3) [15] Hill J. was dealing with confiscatory decrees which did not purport to have effect outside Russia, but his statement of general principle [16] can hardly be explained on either of the two alternative grounds. He says [16]: "These "circulars show that the R.S.F.S.R. recognizes and enforces the "general principle that the passing of chattels is governed by the "law of the place where they are locally situate, and in particular "recognizes that the nationalizing decrees do not operate upon "property outside the territory of the R.S.F.S.R." In the Court of Appeal [17] no general principle was laid down; but Atkin and Lawrence L.JJ. both referred [18] with approval to the whole of the judgment of Hill J.

Maugham J. in *In re Russian Bank for Foreign Trade* [19] was dealing with the same situation, that is, decrees which were confiscatory and which did not purport to have extraterritorial effect. He considers [20] the point with which I am concerned and it is plain that he does not base his decision on the construction of the decrees. He lays down the principle in general terms that the decrees could not have the effect of extinguishing the debt, if locally situate here, or of transferring it to the Soviet Republic.

While it is true that in all these cases there was confiscatory legislation, I think it would be surprising if, with so many masters of the law all intending to restrict the statement of the principle to confiscatory legislation, no one of them had used in his statement of the principle some words of limitation. This consideration disposes me to think that the view of these dicta taken by the Court of Session in *The El Condado*[21] is the right one. The Lord Justice Clerk, having stated that the principle clearly applies to confiscatory or penal laws, inquires[22] whether it equally applies to legislation which is not confiscatory or penal in the full sense. He treats *The Jupiter* (*No.* 3)[23] as being an authority in point, and concludes that the decree cannot apply to movable property outwith the territory and jurisdiction of the foreign sovereign State. Lord Mackay[24] says that he finds in the cases "a most "emphatic train of eminent English judges in favour of the view "that such 'decrees' of a foreign country as purport to have "extraterritorial effect, and to attach property in a subject "situated, and at a time when it is situated, in this country or "its territorial waters, will not be recognized by our laws and "courts." Lord Wark[25] reviews all the English authorities and concludes by adopting the passage in Dicey which I have cited.

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[12] [1926] 1 K.B. 1.

[13] Ibid. 15.

[14] [1910] A.C. 262.

[15] [1927] P. 122.

[16] Ibid. 145.

[17] [1927] P. 250.

[18] Ibid. 255.

[19] [1933] Ch. 745.

[20] Ibid. 767.

My recollection of the argument in *Lorentzen* v. *Lydden & Co. Ld.*[26] is that Atkinson J. was referred to *The El Condado*[27]; but he does not distinguish it in his judgment. I recognize the force of the point that, if the principle were as wide as the custodian says it is, there would be no need for any case to have been decided on the basis that the legislation was confiscatory. But the dicta in the English cases seem to me to be sufficient to support the conclusion in *The El Condado*[27]; and for the reasons that I have given I think that the rule there laid down is a sound one. If Atkinson J. is to be taken as deciding that the general rule was otherwise, I respectfully prefer the decision in *The El Condado*.[27]

The question next arises whether the A.1 decree belongs to a special category which should form an exception to this general rule. The real ground stated by Atkinson J. in *Lorentzen* v. *Lydden & Co. Ld.*[28] for regarding the Norwegian decree as exceptional is that, England and Norway being engaged together in a desperate war for their existence, public policy required that effect should be given to the decree. This reasoning at once gives rise to three comments. The first is that it amounts to the formulation of a new head of public policy, and that is not a matter to be lightly undertaken. The second is that it is using public policy, not in accordance with precedent, as a restriction upon acts which are thought to be harmful to the community, but in a novel way as a positive force to give to an act validity which it would otherwise lack. The third is that it appears to cast on the court the duty of considering to some extent the political merits of the decree itself.

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[21] 1939 S.C. 413; 63 Ll.L.Rep. 330.

[22] 63 LlL.Rep. 334.

[23] [1927] P. 122.

[24] 63 Ll.L.Rep. 338.

[25] Ibid. 341.

[26] [1942] 2 K.B. 202.

[27] 1939 S.C. 413; 63 Ll.L.Rep. 330.

[28] [1942] 2 K.B. 202.

The plaintiffs in their argument before me accept that it is not possible for the courts to judge of the expediency of any particular decree; and I think that they admit also that it would be beyond the wit of man to devise a principle which would admit the politically desirable decrees and exclude the undesirable. They therefore put their submission on this point in a form which seeks a middle way between these two extremities. They submit that the exceptional category consists of decrees of an allied Power in respect of the property of its nationals made in this country with the approval or at least with the acquiescence of His Majesty's Government with a view to keeping property out of the hands of a common enemy. They claim that the approval or acquiescence of the government is to be inferred from the fact that the decree was promulgated in London without objection, and from the language of the property agreement in 1944.

I shall not set out the well-known authorities in which the application of rules of public policy have been considered. I shall refer only to the recent case of *Monkland* v. *Jack Barclay Ld.*,[29] partly because Asquith L.J. puts the effect of the cases in a sentence, and partly because it has some similarity with some of the novel aspects of the plea of public policy in this case. The case was concerned with a scheme promulgated by the Motor Trade Association which sought to prevent by covenant a purchaser of a new car from reselling the car within a certain period after purchase. In form public policy was relied upon negatively; it was said that any contract which did not contain a restrictive covenant as required by the scheme was void as contrary to public policy. In substance it might be regarded as an attempt to use public policy as a positive force in support of the scheme. Asquith L.J., after referring to the specific classes of contracts which had been ruled contrary to the policy of the law, said[30]: "The courts have again and again said that, where a contract "does not fit into one or other of these pigeonholes, but lies "outside this charmed circle, the courts should use extreme "reserve in holding such a contract to be void as against public "policy, and should only do so when the contract is incontestably "and on any view inimical to the public interest. . . . It was

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[29] [1951] 2 K.B. 252.

[30] Ibid. 265.

"suggested by Mr. Pritt that the Motor Trade Association's covenant scheme had the approval of the Government or government officials and that this was in some way relevant to the question whether a contract which departed from it was or was not contrary to public policy. It could only be so relevant if the Government's approval was some evidence that public policy called for the enforcement of the scheme. We think that this is an unfounded suggestion. What one government approves, its predecessor or successor may condemn; and, if the suggestion were acted on, precisely the same contract might have to be held void when government A was in power, and valid when government B was in power. The distinction between political policy and public policy was firmly drawn in *Egerton* v. *Brownlow*,[31] where Lord Truro said [32] that public policy 'has been confounded with what may be called political policy; such as whether it is politically wise to have a sinking fund or a paper circulation, or the degree and nature of interference with foreign States; with all which, as applied to the present subject, it has nothing whatever to do.' For these reasons, in our view, the defendants' point on public policy is wholly unfounded."

The distinction that is there drawn between public policy and political policy seems to me to be equally applicable here. No doubt one could formulate a broad rule of public policy that allied governments should be assisted in time of war. But the extent to which a particular decree serves that end seems to me to be entirely a matter for political decision by the Government of the day, which would have to consider whether all its provisions or some or none of them fitted in with their war policy. A power at war is not bound to regard everything that its allies do as politically desirable.

There is another aspect of the matter with which I must deal because of the importance attached by the plaintiffs to the New York decision of *Anderson* v. *N. V. Transandine*.[33] In that case the A.1 decree was enforced in the State of New York by Shientag J. upon the ground that [34] since "the public policy of the decree is in harmony with the public policy of the forum, the decree should be upheld by our courts under the principles of comity." This was the reasoning which Atkinson J. accepted and followed. In the Court of Appeals,[35] where the decision was upheld, the Attorney-General of the United States was allowed to file a statement of public policy in which the enforcement of the decree was approved with reservations. The court did not pronounce upon the effect of that statement.

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[31] (1853) 4 H.L.C. 1.

[32] Ibid. 196.

[33] (1941) 28 N.Y.Supp. (2nd.) 547.

[34] Ibid. 555.

[35] (1942) 289 N.Y.Rep. 9.

This calls attention to another aspect of the argument submitted by the plaintiffs. If the approval and acquiescence of the British Government is relevant, I do not think that it is a matter to be inferred from their conduct. The only way for the court to ascertain such a matter, when it is relevant, is by making inquiry of the appropriate Minister. There is no precedent for that course in a case of this sort, and neither side has invited me to take it; I think that it would be wrong and unnecessary. It is wrong, because it would put it in the power of the Crown to legislate in a way which might affect the rights of British subjects—for example, creditors of a foreign national—without the authority of Parliament. It is unnecessary, because the Government could in time of war swiftly and easily obtain from Parliament, if it had not already got them, such powers as Parliament thought necessary for enforcing as part of the law of England any foreign legislation which was in the common interest. It can then be fitted easily and with such modifications as may be expedient into the framework of our municipal law. This is the customary way of giving effect to international instruments such as treaties, and is in substance, if not in form, what was done by the Allied Forces Act, 1940. These considerations make *Anderson* v. *N. V. Transandine* [36] appear to me to be a dangerous precedent to follow. Public policy appears to be in the hands of the New York courts a more flexible instrument than it is in this country. The reference by Shientag J. to *United States* v. *Belmont* [37] suggests that the public policy of the United States, or of the State of New York, does not necessarily exclude even confiscatory legislation.

In my judgment it would be unwise, in the light of these considerations and of the authorities, to propound as a new rule of public policy the principle for which the plaintiffs contend. I need hardly say that it is only after much thought that I have rejected the guidance given by the decision of Atkinson J. in *Lorentzen* v. *Lydden & Co. Ld.*[38]; and I have done so only because upon reflection I think that it cannot be made to conform with the authorities which regulate the use of public policy.

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[36] 28 N.Y.Supp. (2nd.) 547; 289 N.Y.Rep. 9.

[37] (1937) 301 U.S. 324.

[38] [1942] 2 K.B. 202.

In this respect I may say that I have had from the Solicitor-General the benefit of a much fuller and more able presentation of the relevant considerations than Atkinson J. had in the unsuccessful argument before him.

I have been dealing with public policy as a force which has to be invoked by the plaintiffs in order to succeed. Many of these considerations would also apply on the first part of the argument. If foreign legislation is as a general rule to be admitted, it would have to be excluded when politically harmful; and the difficulty of formulating any satisfactory principle of exclusion is in my view a formidable argument against the validity of the rule.

In my judgment the claim against the custodian fails, and I must turn to the other main issue involving the claim against the administrator. I have to consider whether the gold and bank balances were subject to the charge imposed by the Treaty of Peace (Hungary) Order, 1948; if they were not, under article 1 (5) (*g*), which I have already recited, the owner is entitled to recover them from the administrator. What is subject to the charge is determined earlier on in the article. Paragraph (1) opens by giving the effect of law to certain Treaty provisions, including article 29; and then continues "for the purpose of "carrying out those provisions the following provisions shall have "effect." Paragraph (2) imposes the charge and paragraph (3) specifies to what property the charge is to apply, and is in the following terms: "Paragraph (2) of this Article applies to any "property, rights or interests within His Majesty's Dominions "and Protected Territories (except the Dominions) belonging to "or held or managed on behalf of the Government of Hungary "or a Hungarian national and shall include (i) any such property, "rights or interests in the possession of a Custodian of Enemy "Property under or by virtue of an Order made by the Board of "Trade under section 7 of the Trading with the Enemy Act, "1939, and the net proceeds of the sale, liquidation or other "dealings by the Custodian of Enemy Property with any such "property, rights or interests that are or have been in his "possession as aforesaid; (ii) property, rights or interests which "have been subject to control by reason of a state of war existing "between Hungary and His Majesty."

Paragraph (3), which contains the crucial definition of "property, rights and interests," is textually wider than article 29 of the Treaty from which it presumably derives, notably in adding to the words "belonging to" a Hungarian national the words "or held or managed on behalf of." Whether it is merely being more explicit, or whether it is intended to enlarge the definition of Hungarian property, is one of the questions which has been discussed. If on its true construction it enlarges the definition of Hungarian property, the plaintiffs say that the order is ultra vires the Treaty of Peace Act. The administrator answers that the order contains the Crown's interpretation of the Treaty which cannot be challenged in any court of law. The plaintiffs, while disputing this, rejoin that if the Crown has exclusive rights of interpretation and has exercised them by adding words to the definition in the Treaty, the extended definition must be taken to be as comprehensive as the Crown desires and to be expressed in words which do not require to be stretched beyond their ordinary meaning seen in the light of ordinary English legal principles. The point is a shrewd one, for the administrator, as will be seen, pleads for an exceptionally wide construction of paragraph (3) of the order.

Before construing paragraph (3) it is necessary to ascertain what classes of property rights and interests are introduced into the paragraph by sub-paragraph (ii) as having been "subject to "control." The class is enemy property as defined in the Trading with the Enemy Act, 1939, s. 7, and that is "any "property for the time being belonging to or held or managed on "behalf of an enemy or an enemy subject." The sub-paragraph is indeed more comprehensive than the main paragraph. First, it includes the property of territorial enemies, if I may use that term to describe persons who, whether Hungarian nationals or not, were enemies because of their residence in Hungary. It includes also property of persons who are not Hungarian nationals in another respect, that is property belonging to companies which were controlled by residents in Hungary. This is because of the wide definition of territorial enemies given in section 2 of the Act. Secondly, whereas for the purpose of the main paragraph the belonging, holding or managing would have to exist at the time when the order came into force, namely, on February 2, 1948, for the purpose of the sub-paragraph it can have existed at any time, so long as there was some moment in the past at which, by virtue of the belonging, holding or managing, the control attached. This enables the administrator, as he claims, to dispense with any investigation into the nationality and interests of the Baron's descendants; he can say that it was sufficient that from 1941 to 1947 the property was subject to control by virtue of the Baron's nationality. Lastly, it is said that the words derive a wider meaning from their context in the Trading with the Enemy legislation than they might otherwise have.

All these points of interpretation are contested by the plaintiffs. But it is plain that the sub-paragraph is at least as wide as, if not wider than, the main provision; and that the question that arises under each is whether the gold and bank balances were property belonging to the Baron or held or managed on his behalf.

The administrator's proposition is that for the purpose of the order property owned by a company belongs to its shareholders, or alternatively is held or managed by the company on behalf of its shareholders. I must say that, if the skilful contentions of the Solicitor-General and Mr. Upjohn had not proved the contrary, I should have thought this proposition to be beyond the reach of sustained argument. It seems to me to be contrary to all authority and principle. But the argument to which I have listened deserves, and the amount at stake justifies, a detailed consideration of the point. I shall look first at the authorities. *Salomon* v. *Salomon & Co.*[39] proclaimed the distinction between the "one man" company and its principal shareholder; and in particular Lord Halsbury L.C.[40] and Lord Herschell[41] dealt with the notion that such a company was the agent of the shareholder. Lord Herschell said[41]: "In a popular sense, a company may in "every case be said to carry on business for and on behalf of its "shareholders; but this certainly does not in point of law "constitute the relation of principal and agent between them." In *Macaura* v. *Northern Assurance Co. Ld.*[42] it was held that the sole shareholder in a company, who was also its main creditor, had no insurable interest in the property of the company. Lord Buckmaster said[43]: "Now, no shareholder has any "right to any item of property owned by the company, for he "has no legal or equitable interest therein. He is entitled to a "share in the profits while the company continues to carry on "business and a share in the distribution of the surplus assets "when the company is wound up." In *E. B. M. Co. Ld.* v. *Dominion Bank*[44] Lord Russell of Killowen, giving the advice of the Privy Council, rejected the suggestion that the assets of a company might in substance be regarded as the assets of the three individuals who constituted its main shareholders. He said that it[45] was " of supreme importance that the distinction should " be clearly marked, observed and maintained between an incorporated company's legal entity and its actions, assets, rights " and liabilities on the one hand, and the individual shareholders " and their actions, assets, rights and liabilities on the other " hand."

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[39] [1897] A.C. 22.

[40] Ibid. 31.

[41] Ibid. 43.

[42] [1925] A.C. 619.

[43] Ibid. 626.

[44] [1937] 3 All E.R. 555.

The fact that a company has an enemy character or that the property of the company is being dealt with for the purpose of the Trading with the Enemy or Treaty legislation makes no difference. In *Daimler Co. Ld.* v. *Continental Tyre and Rubber Co. (Great Britain) Ld.*,[46] Lord Parker of Waddington showed that the considerations which endowed a company with enemy character at common law because of the character of its shareholders had nothing to do with property. He said[47]: " No one " can question that a corporation is a legal person distinct from " its corporators; that the relation of a shareholder to a company, " which is limited by shares, is not in itself the relation of " principal and agent or the reverse; that the assets of the " company belong to it and the acts of its servants and agents " are its acts, while its shareholders, as such, have no property " in the assets and no personal responsibility for those acts." Considering the argument that when the law is concerned with the artificial person, it is to know nothing of the natural persons who constitute and control it, he said[48]: " In questions of " property and capacity, of acts done and rights acquired or " liabilities assumed thereby, this may be always true. Certainly " it is for the most part. But the character in which property is " held, and the character in which the capacity to act is enjoyed " and acts are done, are not in pari materia. The latter character " is a quality of the company itself, and conditions its capacities " and its acts. It is not a mere part of its energies or acquisi" tions, and if that character must be derivable not from the " circumstances of its incorporation, which arises once for all, " but from qualities of enmity and amity, which are dependent " on the chances of peace or war and are attributable only to " human beings, I know not from what human beings that " character should be derived, in cases where the active conduct " of the company's officers has not already decided the matter, " if resort is not to be had to the predominant character of its " shareholders and corporators."

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[45] [1937] 3 All E.R. 555, 564.

[46] [1916] 2 A.C. 307.

[47] Ibid. 338.

[48] Ibid. 340.

The distinction was again emphasized by Lord Sterndale in *The Noordam* (*No.* 2).[49] That was a case in which the phrase "enemy property" was being considered for the purpose of prize law. Lord Sterndale said[50]: "Counsel for the American Express "Company argued that although it was technically a German "registered company it was entirely American; that is to say, "99 per cent. of its capital was held by Americans and 1 per "cent. by British shareholders, and according to *Daimler Co. Ld.* "v. *Continental Tyre and Rubber Co.* (*Great Britain*) *Ld.*[51] the "court should look behind the legal entity of the registered "company, and discover who are the persons really interested. "That case held that, for one purpose at any rate—and perhaps "for some others—the court must look behind the legal entity, "and determine who are the real controlling persons. How it is "to be ascertained who the real controlling persons are, and "whether they are composed of a bare majority or a two-thirds "majority or whatever it may be, is not specified. But it is not "necessary to look into that, because the judgment of Lord "Parker expressly excepted from the operation of that principle "the question of property."

It is worth noting, when a document of an international character is being indirectly construed, that these principles are not peculiar to English law. The point was considered by an international tribunal, the Permanent Court of International Justice, in *Standard Oil Company's Claim*,[52] where it declares that[53] "the decisions of principle of the highest courts of most "countries continue to hold that neither the shareholders nor "their creditors have any right to the corporate assets other than "to receive, during the existence of the company, a share of the "profits, the distribution of which has been decided by a "majority of the shareholders, and, after its winding up, a "proportional share of the assets."

No authority containing any statement of principle has been cited to the opposite effect. The administrator relied on the decision of the Court of Appeal in *In re Miller, Ex parte Official Receiver*[54] as showing the wide meaning which might in certain circumstances be given to the word "belonging." The Court of Appeal there held that for the purpose of the Friendly Societies Act, 1875, s. 15 (7), money which a treasurer of a friendly society

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[49] [1919] P. 255.

[50] Ibid. 259.

[51] [1916] 2 A.C. 307.

[52] British Year Book of International Law, 1927, p. 156.

[53] Ibid. 162.

[54] [1893] 1 Q.B. 327.

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had received for the society was " money or property belonging to " the society," although it was not in his possession in specie and could not be traced. Once it was concluded, as the Court of Appeal concluded, that the money referred to in the section could not mean coins physically in the possession of the holder, it was difficult to give an intelligent meaning to the section without treating money had and received for the use of the society as money which belonged to it. I do not think that much assistance is to be derived from this. Nor do I think that the wide words of Sir A. L. Smith M.R., which were also relied on, in *Driefontein Consolidated Gold Mines Ld.* v. *Janson*[55] are of much help. They were not measured to fit the sort of point which I have to consider, and may be contrasted with what Lord Macnaghten said in the same case in the House of Lords.[56] That is how the matter is dealt with generally in the authorities.

I shall consider next the word " belonging " in its place in paragraph (3) of article 1 of the order of 1948, and then the phrase " held or managed on behalf of." In construing the paragraph I do not think that the question is simply, as was argued for the administrator, to give to the word " belonging " a meaning wide enough to include what was called the substantive owner as well as the person who is the owner in the eyes of the law. The word cannot be isolated from the property rights and interest to which it appertains. When one talks about property loosely, one may mean a piece of property such as a specific chattel. If one speaks of a specific chattel, such as a chair, as belonging to Smith, there may be room for the admission of some looser connexion between Smith and the chair than that which is ordinarily denoted by the conception of property. But " property, rights or interests " cannot be used in the paragraph in a loose sense to denote a concrete piece of property. If a chattel owned by a Hungarian is pledged to an Englishman, it is conceded that the administrator takes the chattel subject to the pledge; that is, he does not take the chattel as a piece of property, but the property which the Hungarian has in the chattel. That property can only be identified in relation to an owner, and has therefore no existence apart from the legal relationship which requires a legal owner to make it complete. All choses in action, such as debts and other rights and interests, can only be identified in relation to the person who has the legal rights.

When, therefore, a legal document talks of property rights and interests belonging to a person, it must mean belonging to the person who in law owns them. As Lord Macnaghten said in *Heritable Reversionary Co. Ld.* v. *Millar*[57]: "The words 'pro-"'perty' and 'belonging to' are not technical words in the law "of Scotland. They are to be understood, I think, in their "ordinary signification. They are in fact convertible terms; you "can hardly explain the one except by using the other. A man's "property is that which is his own, that which belongs to him. "What belongs to him is his property." It is idle to seek to extend the meaning of the word "belonging" unless one can find some property right or interest to which it can attach; and the admission, which has to be made, that a shareholder has no property rights or interest in any of the assets of the company is fatal to the administrator's case.

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[55] [1901] 2 K.B. 419, 427.

[56] [1902] A.C. 484, 497.

If there be any doubt on the construction of the paragraph taken by itself, it is legitimate to look at the order as a whole. Indeed, it is hardly possible for the administrator, in the light of the authorities, to insist upon so unusual a construction of "belonging," unless the nature of the order is such as to compel its adoption. I find nothing in the scope of the treaty or of the order as a whole which suggests that any extraordinary meaning is to be given to the paragraph. On the contrary, if the property of a company is to be deemed to belong to its shareholders, I think it would make the administration of the order almost impossible. The administrator concedes—I think rightly, because in this connexion the argument is dealing with property and not with control—that the position is the same in the case of a 1 per cent. shareholder as of a 100 per cent. shareholder. I understand the argument to be that the property belongs both to the company who is its owner in law, and to the shareholders; the shares in the company are, of course, property which belong to the shareholders. The administrator can get all the property of a Hungarian company irrespective of its shareholders, and the appropriate fraction of the property of any other company.

Since in ascertaining the appropriate fraction it is permissible to disregard the creditors—that is a point I shall have to consider later—it would obviously be to the advantage of the administrator to take a fraction of the company's property rather than to vest in himself the corresponding shares. How does he attempt to charge, let us say, 1 per cent. of all the property rights and interest—land, stock-in-trade, book debts and goodwill—of a large public company as they existed on February 2, 1948? The ascertainment of them alone would be a herculean task. What has to be delivered to him if he exercises his powers under paragraph (5) (*e*)? Meanwhile, the company, if it knew that it had a Hungarian shareholder upon the register, could hardly continue to trade, except by favour of the administrator, without incurring criminal liability under paragraph (5) (*a*). The question of what would in these circumstances happen to the shares was not fully explored. If the Hungarian had, for example, a 10 per cent. shareholding in a company which enabled the administrator to have a charge over, and perhaps have vested in himself, under paragraph (5) (*h*), 10 per cent. of the company's assets, would the shares still survive for the purpose of dividends, and would the Hungarian be entitled to 10 per cent. of the remaining assets on the winding up? The difficulties are obviously enhanced if, as the administrator contends, the investigation has to be pursued down a chain of holding companies. What happens if a Hungarian owns shares in a foreign neutral company which owns shares in an English company, and so on?

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[57] [1892] A.C. 598, 621.

I turn now to the phrase "held or managed on behalf of," which is to be construed upon the assumption that the word "belonging" does not confer any rights of property on the shareholder. It is not contended that a company holds or manages property as agent for its shareholders. The authorities that I have cited are inconsistent with that notion; and if any further authority be required, the judgment of Tomlin J. in *British Thomson-Houston Co. Ld.* v. *Sterling Accessories Ld.*[58] is in point. Prima facie, the words "on behalf of" are apt to denote agency, but the defence submits that they are not to be restricted to that. They are intended, it is argued, to add something substantial to the word "belonging," and if they referred to agency only, they would not do that, because property which is held or managed on behalf of a principal must necessarily belong to the principal. In seeking for a wider meaning, it is conceded that it must still be a meaning that denotes some legal relationship; the door would be thrown open too wide if it let in property which A conceived of himself as holding on behalf of B out of some sense of moral duty or affection. The legal relationship, so it is argued, that is relevant for the purposes of this case is that which exists between a majority shareholder and the company. This creates a nexus consisting of the right of control which enables the shareholder by means of a winding up to get the property of the company into his own hands. This nexus is sufficient, it is said, to justify the description of the company as holding the property "on behalf "of" the shareholder. A wide meaning, it is contended, must be given to this phrase because of its place in the Trading with the Enemy Act, 1939. Parliament cannot have intended for the purpose of the Trading with the Enemy legislation to catch the property of an enemy national, but to leave outside the scheme of control the one-man company through which he might operate.

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[58] [1924] 2 Ch. 33, 38.

The plaintiffs answer these points, I think satisfactorily, in three ways. First, they say that there is neither need nor justification for giving to "held or managed" any meaning widely extensive of "belonging," nor for assuming that it cannot refer to agency. It is not correct to assume that property held by an agent always belongs to his principal. A sub-agent has normally no relationship of agency with his principal's principal. A bank in London might, for example, hold property on behalf of a Hungarian bank, the Hungarian bank being only the agent of some principal unknown to the London bank. The fact that it was held for an enemy concern would be sufficient to taint it for the purpose of Trading with the Enemy legislation; and therefore agency is sufficient to catch the property without it being necessary to prove that it was owned by the Hungarian bank or to ascertain (which might be difficult) the identity of the person to whom it really did belong. Moreover, one cannot escape from the fact that the object of the order is to give effect to the treaty. If the intention had been to add a large new class of Hungarian property, a class not covered by the word "belonging," it is hardly likely that the order would have taken the form which it did. Article 1 of the order then almost becomes contradictory, since it opens by giving legal effect to the treaty itself, which is limited to the smaller class. The better interpretation is that the phrase "held or managed" is intended as a slight expansion or elucidation of the word "belonging" and not as introducing a new and independent addition.

Secondly, its place in the Trading with the Enemy legislation and the consideration of that legislation as a whole offers no encouragement to the construction suggested. The main object of the Act is to deal with territorial enemies. The power that is taken over the property of enemy subjects is one which, I should infer, was only intended to be exercised in exceptional cases; and I am told that in practice it has been used only in that way. If it had been exercised ruthlessly, a Hungarian subject in this country, who had resided here for many years and whose loyalty was above suspicion, might have been stripped of every asset he here possessed. The same thing would have happened to refugees who had sought refuge from oppression in this country or in neutral territories. It is not therefore surprising if Parliament thought that a power of this sort need not be developed to the extent of including one-man companies. If in an exceptional case a Hungarian was found to be operating in England or in neutral territory through a one-man company to the national disadvantage, there are plenty of ways under the Act in which he might have been dealt with. If it was an English company, control of it could have been obtained by the vesting of all the shares in the custodian. If it was a neutral company, its name could have been placed on the black list under section 2 (2) of the Act of 1939. Or a restriction order might have been made under section 3A of that Act (see Defence (Trading with the Enemy) Regulations, 1940, reg. 3A).

It would not therefore be startling to find that the one-man enemy-subject company was not made a specific objective. What would be surprising is that if such a company was intended to be covered, it was not covered in express words. The notion of the enemy character of a corporation was, of course, present to the mind of Parliament, and in section 2 of the Act the conditions of control by a territorial enemy which give the corporation an enemy character are clearly laid down. It is most unlikely that if Parliament had intended to give an enemy character to corporations controlled by an enemy subject, it would not have had recourse to the same formula. "Enemy subject" is defined in section 15 and it includes as well as an individual a company incorporated in or under the laws of an enemy State; that is to say, it picks out paragraph (*d*) in section 2 (1) and omits paragraphs (*c*) and (*e*) of the Act of 1939 (see Defence (Trading with the Enemy) Regulations, 1940, reg. 3). Nothing would have been simpler than to have included in the definition a reference to the apparatus of control devised in paragraphs (*c*) and (*e*).

Finally, there is no precedent for describing the suggested legal nexus as a relationship which can be comprehended by the words "on behalf of." While the proposition might in loose talk pass muster in the case of the 100 per cent. shareholder, it will not, I think, bear analysis if there is any minority, however small. This is important, not only because the administrator makes his argument wide enough to cover at least the majority shareholder, but because of the light it throws on the truth of the proposition itself.

Take the case of a shareholder who holds 51 per cent. It does not matter for this purpose whether he has 51 per cent. or 99 per cent., so long as his holding is sufficient to put the company into liquidation so that his rights of control in relation to the property of the company are the same as those of a 100 per cent. shareholder. In such a case it can hardly be said that the company holds or manages all its property for the 51 per cent. shareholder, so it is argued that the company holds or manages 51 per cent. of its property for the 51 per cent. shareholder and 49 per cent. for the other shareholders. What property is in these circumstances subject to the charge I do not pause to inquire. If the true view be that the company holds its property proportionately as much for the minority as for the majority shareholder, what becomes of the special nexus of control which is said to constitute a peculiar relationship? If two shareholders between them hold 51 per cent. of the company's shares and thus can obtain a winding up if they want it, does the company own 25½ per cent. of the property for each of them? If so, then the company holds its property on behalf of any number of shareholders who may at any time constitute the majority, which is the same thing as saying that it holds the property on behalf of any or all of them. I cannot think that out of the conception of control of a company there can be derived anything which can be comprehended in the relationship created by "on behalf of."

In reviewing these arguments, I have so far ignored the formidable factor of creditors. The defendants say that the creditors of a company, whether they be debenture holders or otherwise, so long as they have no charge on any specific asset, must be ignored. The justification for this is said to be that it is what would happen in the case of an enemy individual. In his case all his unsecured property would be taken and the creditors would be left with nothing. I do not think the interposition of a company can be obliterated by the use of this analogy. The whole argument for the administrator is that "belong" is used to get at the person whom the man in the street would say the property really belonged to. If a company owed more than the value of its assets, I do not think that the man in the street would say that its property "belonged" to the shareholders—certainly not the man in any City street. Similarly, if property is held or managed on behalf of a 100 per cent. shareholder because he could obtain a liquidation, one cannot ignore that what he obtains on a liquidation is no more than the property after the creditors have been satisfied.

In the end it appears to me much as it did in the beginning. No doubt the legislature can forge a sledgehammer capable of cracking open the corporate shell; and it can, if it chooses, demand that the courts ignore all the conceptions and principles which are at the root of company law. But the phrase "belonging to or held or managed on behalf of" is too mild a weapon for that purpose. It is worth noting that in similar cases of the distribution of enemy property where the legislature has required the sort of effect for which the administrator is here contending, it has said so specifically. Out of several examples cited in argument I need refer only to the Distribution of German Enemy Property Act, 1949, and to the definition of "German enemy property" contained in section 8 (1).

For these reasons the plaintiffs are entitled in my judgment to recover their property from the administrator. The plaintiffs ask for interest on the sum awarded and the administrator submits that the court has no power to give interest. It is not disputed that prima facie the court has a statutory discretion to award interest in this case, but it is submitted that it is excluded by the words "but not to any other remedy" in article 1 (5) (*g*) of the Order of 1948. These words are, I think, primarily directed to the exclusion of such remedies as damages for conversion. The power to award interest is not so much an independent remedy as a measure of compensation to a plaintiff for the time, much of which may be occupied by the lawsuit itself, during which he has been kept out of his money. It is now almost as much an incidental part of the relief granted by the courts as are costs. It is not suggested that the power to award costs is excluded by paragraph (5) (*g*); and while interest is not quite in pari materia, I think that the same broad considerations apply to it, and that it is relief ancillary to the remedy that is granted, and not a separate and additional remedy.

I think, therefore, that I have a discretion. I doubt whether I should use it in any case in which the issue depended upon disputed fact, since the burden of proof is placed on the defendant. But in this case my judgment has depended on the law. If the administrator had not taken what is in my view a quite erroneous view of the construction of the order, the plaintiffs would have had their money in July of 1948. Accordingly, I shall award interest on the sum due from the administrator at the rate of 4 per cent. per annum from April 6, 1950.

Judgment for the custodian.
Judgment for the bank against the administrator.

R. P. C.

C. A.

The custodian had invested the proceeds of the sale of the gold, and it was conceded by him and the administrator that as a result of this judgment the bank was entitled to recover the income derived from those investments, as well as the capital sum representing the proceeds of the sale. The bank claimed that that income should be paid over to it without any deduction for income tax and the case was restored to the list for the determination of this question. Devlin J. accepted the bank's contention. The administrator appealed. The custodian, being no longer interested, took no part in the appeal.

Sir Lionel Heald A.-G., *J. H. Stamp*, *J. P. Ashworth* and *R. J. Parker* for the Administrator of Hungarian Property. The bank, being a Netherland bank, became an enemy as soon as Holland was occupied by Germany and £2,000,000 in gold became vested in the Custodian of Enemy Property. The question raised in this appeal is whether the custodian was liable to pay income tax on the interest realized on the amount in question until the time he paid it over to the administrator. The legal background is most important. The position of the custodian during the war of 1914–18, which is dealt with in *In re Münster*,[59] was somewhat different, for under the Trading with the Enemy Act, 1939, it was not provided that the Public Trustee should be the Custodian of Enemy Property. In fact, however, the Public Trustee was appointed but he was not exempted from income tax. By section 7 of the Act the Board of Trade had power to appoint the Custodian of Enemy Property.

By the Trading with the Enemy (Custodian) Order, 1939, para. 1 (i), there is a general direction that money that would, but for the state of war, be payable to or for the benefit of an enemy is to be paid to the custodian, and there are regulations under which the custodian has to invest the money so passing. Further, under paragraph 3 (1) the custodian was to hold any money so passing into his hands until the end of the war, when it would be dealt with by the Board of Trade. The position under both the First and Second Great Wars was that when enemy money or property was vested in the custodian the beneficial interests were suspended: *In re Münster* [59] and *In re Gourju's Will Trusts.*[60] The position of an administrator was different: *Administrator of Austrian Property* v. *Russian Bank.*[61] It appears to have been argued that the custodian represented the Crown directly or indirectly, but it was certainly not true to say that property vested in the custodian was Crown property: *Territorial and Auxiliary Forces Association of the County of London* v. *Nichols* [62] and *Tamlin* v. *Hannaford.*[63] The vesting of property in the custodian is intended to prevent this. *Kelly* v. *Rogers* [64] indicates that the income of money in the hands of the custodian is liable to income tax.

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[59] [1920] 1 Ch. 268.

J. H. Stamp followed on the same side. It is an overstatement to say that the Income Tax Act, 1918, did not bind the Crown. It depends on the purpose for which money is received by the Crown whether income is protected by the prerogative: see *Mersey Docks and Harbour Board Trustees* v. *Cameron* [65] and *Coomber* v. *Berkshire Justices.*[66] Property vested in the custodian is held in suspense till the end of the war and it has nothing to do with the Crown.

Russell Q.C. and *Mark Littman* for the bank. The whole question here is who is bound to pay income tax under the Income Tax Act, 1918. The custodian has the legal title to enemy property vested in him for the public purposes of the Government as an instrument of the Crown. The custodian may well be a public servant because he is told to do certain things. Cases such as *Kelly* v. *Rogers* [67] have nothing to do with this case. The Crown is not bound by any statute in which it is not expressly mentioned. The authority conferred on the Custodian of Enemy Property is derived from the prerogative power of the Crown to seize any enemy property until such time as it is thought right to return it. How property which thus falls into the hand of the custodian is dealt with is entirely a matter for the Crown. The property in question did not belong to a Netherland subject. The Treasury could at the end of the war have directed payment over of both the gold of which possession was taken or the sum realized in respect of it and the fruits thereof. The power to direct handing over of the enemy property is given to the Board of Trade but it is plain that unless an order had been made by the Crown there would be nobody recognized as beneficially entitled.

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[59] [1920] 1 Ch. 268.
[60] [1943] Ch. 24.
[61] (1931) 48 T.L.R. 37.
[62] [1949] 1 K.B. 35.
[63] [1950] 1 K.B. 18.
[64] [1935] 2 K.B. 446, 467.
[65] (1865) 11 H.L.C. 443.
[66] (1883) 9 App.Cas. 61.
[67] [1935] 2 K.B. 446, 467.

In the present case the Administrator of Hungarian Property obtained the transfer of the property vested in the custodian.

The property was vested in the custodian as a matter of war control but not the beneficial interest in it. It may well be that the Crown had the right through the Board of Trade to dispose of the enemy property to whomsoever was thought fit. The beneficial interest in the property was suspended, but otherwise the property is held by the custodian until an order of the Board of Trade is made, dealing with it. On the question whether the custodian was the servant or agent of the Crown, they referred to *Bray* v. *Lancashire Justices*.[68]

There is no direct authority that the property of an enemy could at common law be confiscated. The position of an enemy under the Act of 1939 is different from that at common law. After the enemy's property has vested under the Act in the custodian, it cannot be said that the custodian holds the property upon trust for the enemy. All that is left to the enemy is a spes restitutionis. Whether in fact the enemy recovers anything at the end of the war depends on the provisions then made. In such circumstances, it cannot be said that the enemy retains any beneficial interest. The custodian could not retain the property vested in him for his own use beneficially. He holds the property as agent of the Crown. The bank's rights stem from the Hungarian peace treaty.

It is not denied that all enemy property was earmarked in the custodian's books but that of itself does not mean that any rights were reserved to the enemy owner. It is clear that such property could have been given away from the original owner by an order of the executive. If no order were made, there would not be any resulting trust at the end of the war for the enemy. The enemy owner if he had come to this country would not have been entitled to restrain the custodian by injunction from misapplying the property. He would have no right to question any dealing by the custodian with the property.

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[68] (1889) 22 Q.B.D. 484.

The Custodian of Enemy Property had wider functions to perform than the administrator of enemy property. The custodian's powers are referable to the war-making powers of the Crown as well as to the peace-making powers. His status is based partly on statute and partly on orders in council. It is submitted that there is no distinction in principle between this case and that in *Administrator of Austrian Property* v. *Russian Bank for Foreign Trade.*[69] These investments were held by the custodian as an officer of the Crown and as such has Crown status and is not liable to pay income tax. The Income Tax Acts do not bind the Crown.

Sir Lionel Heald A.-G. in reply. It is submitted first that the case of *Administrator of Austrian Property* v. *Russian Bank for Foreign Trade*[69] is not a direct authority in this case. That decision turned on the statutory provisions in force at the end of the 1914–1918 war. Each case must be considered in relation to the income in question. In order to ascertain whether the criteria for exemption from tax are satisfied two things have to be considered:—First, the capacity of the individual whose income is in question; secondly, the character of the income which he is handling. The first matter may be conclusive, as in the case of Her Majesty herself or in the case of one of the Secretaries of State where the right to exemption is clear. In other cases, it must be shown that the income is applicable for public purposes. Here the custodian cannot claim Crown status. He did not receive the income by reason of the war-making prerogative powers of the Crown or of its treaty-making powers: see *Vamvakas* v. *Custodian of Enemy Property.*[70] [He referred to Halsbury's Laws of England, 2nd ed., Vol. 6, p. 482.]

It is necessary to look at the purpose for which the income is held. It is the fruit of the proceeds of sale of the gold bars. It passed with the proceeds. The proceeds were held in statutory suspense during the war and now that it has been held that the proceeds pass to the bank, the bank is only entitled to the income after deduction of tax on the footing of its ownership. [He referred to *Hugh Stevenson & Sons, Ld.* v. *Aktiengesellschaft für Cartonnagen-Industrie.*[71]]

Cur. adv. vult.

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[69] 48 T.L.R. 37.

[70] [1952] 2 Q.B. 183.

[71] [1918] A.C. 239.

November 4, 1952. The following judgments were read:—

C. A.
1952

Bank voor Handel en Scheepvaart N.V. v. Slatford.

EVERSHED M.R., after stating the facts, continued:—It was and is conceded by Mr. Russell for the bank (and agreed by the Attorney-General) that the produce or "fruits," as they have been called, of the investment of the principal fund are "annual "profits or gains" within the ambit of the charge created by Sch. D to the Income Tax Act, 1918. They are, it is said, annual profits or gains arising or accruing to a person residing in the United Kingdom (viz., the custodian) from property situate in the United Kingdom within the meaning of para. 1 of the Schedule. They would therefore prima facie fall within the terms of para. 1 of the Miscellaneous Rules applicable to Sch. D which, so far as relevant, provides that "Tax under this Schedule shall "be charged on and paid by the person . . . receiving . . . the "income in respect of which tax under this Schedule is herein-"before directed to be charged." But the bank said in the court below and say now that the person receiving the income, that is, the custodian, was by virtue of his office and the "Crown status" (to use the language used by Scott L.J. in *Territorial and Auxiliary Forces Association of the County of London* v. *Nichols*,[72] and borrowed by Devlin J.) with which his appointment and the nature of his official functions invested him, immune from liability to assessment on the general and well-known principle, expressed in popular language, that "the "Income Tax Act does not bind the Crown." I should add that it is agreed by both parties that the "fruits" or interest, having been derived from the realization of Treasury bills bought at a discount, must be treated as "created income" for income tax purposes and is therefore exempt from the provisions as regards the custodian's liability for tax contained in the Finance Act, 1944.

It is here that the issue is joined. The trial judge accepted the argument of the bank; but, with deference to the judge's view, I have reached a different conclusion. It was not (as I understand his judgment) the view of the judge that the office of custodian was such, of itself and without anything more, to confer upon its holder the immunity belonging to the Crown. Certain of the great offices of State, whose powers may be said to be directly derived from those in earlier times exercised by the King in person, may be able to assert that "Crown status" attaches to them, inevitably and with all its consequences, while acting in the exercise of their official duties. The office of the custodian is clearly not of this character—which could not, indeed, be easily attributed to an official bound, as regards the moneys with which we are concerned, to obey the directions or demands of the Treasury, the Board of Trade and (later) the Administrator of Hungarian Property. And I agree with the judge that the matter is not advanced by the use of such expressions as "emanations of the Crown," which convey no meaning capable of precise significance. It is clear that the modern machinery of government is exercised in many of its aspects by officials appointed by the executive under powers created or conferred by Acts of Parliament and that "Crown "immunity" will only belong to such officials if and so far as it is the logical and necessary consequence of the character of their powers and responsibilities or (as regards any property in their hands) of the purposes to which it must be applied. It was the view of the judge—and Mr. Russell has not really sought to go further in this respect—that the case of the custodian fell within this class. But the judge thought that the character of his duties satisfied the condition requisite for Crown immunity. "His duties," he said, "bring him within the sphere of two "of the most ancient and peculiar prerogatives of the Crown— "the power to make war, including the power to take for itself "the property of an enemy found within the Realm, and the "power to make peace." In this view of the custodian's functions, he thought the *Austrian Administrator's* case [73] (to which I must later refer) conclusive. And so he held that the custodian received the income in question "as a person having "Crown status, or at the least that he received it for a Crown "purpose."

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[72] [1949] 1 K.B. 35, 47.

The question being whether, as respects the income received by him (being income admittedly within the charging provisions of Sch. D), it is taxable in the custodian's hands, it is first necessary to examine the purposes for which he received it, to ask what were the custodian's duties in regard to such income when it came into his hands. That this is the proper approach in a matter of this kind appears to me to follow from such cases as *Coomber* v. *Berkshire Justices*.[74] In that case, the question being whether the respondents were liable to be assessed for income tax under Sch. A or B of the Income Tax Act, the House of Lords based their answer (which was favourable to the respondents) by considering the purposes for which the premises were applied and concluding that such purposes were wholly public purposes, that is, purposes of the central government of the country. So much appears—to make but one citation—from the beginning of Lord Watson's speech. He said [75]: "I entertain "no doubt that the occupiers of buildings used as courts of assize, "or as county police stations, are within the privilege of the "Crown and are therefore not liable to be rated under the first "section of the Act of the 43 Eliz. c. 2. In the case of *The* "*Mersey Docks* [76] my noble and learned friend (Lord Blackburn), "delivering the opinion of five of the consulted judges, said: "'Long series of cases have established that where property is "'occupied for the purposes of the government of the country, "'including under that head the police and the administration of "'justice, no one is rateable in respect of such occupation. And "'this applies not only to property occupied for such purposes "'by the servants of the great departments of State, such as "'the post office, *Smith* v. *Birmingham Guardians* [77]; the Horse "'Guards, *Lord Amherst* v. *Lord Sommers* [78]; or the Admiralty, "'*The Queen* v. *Stewart*,[79] in all which cases the occupiers might "'strictly be called the servants of the Crown; but also to "'property occupied by local police, *Justices of Lancashire* v. "'*Stretford* [80]; to county buildings occupied for the assizes, and "'for the judges' lodgings, *Hodgson* v. *Local Board of Carlisle* [81]; "'or occupied as a county court, *The Queen* v. *Manchester* [82]; "'or for a jail, *The Queen* v. *Shepherd*.[83] In these latter cases "'it is difficult to maintain that the occupants are, strictly "'speaking, servants of the Sovereign, so as to make the occu"'pation that of Her Majesty; but the purposes are all public "'purposes of that kind which, by the constitution of this "'country, fall within the province of government, and are com"'mitted to the Sovereign; so that the occupiers, though not "'perhaps strictly servants of the Sovereign, might be considered "'in consimili casu. And the decisions are uniform, and were "'not disputed at the bar, that the exemption applies so far; "'but there is a conflict between the decisions as to whether the "'exemption goes farther.'"

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[73] 48 T.L.R. 37.

[74] (1883) 9 App.Cas. 61.

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[75] 9 App.Cas. 61, 72.
[76] 11 H.L.C. 443, 464.
[77] (1857) 7 E. & B. 483.
[78] (1788) 2 T.R. 372.
[79] (1857) 8 E. & B. 360.
[80] (1858) E.B. & E. 225.
[81] (1857) 8 E. & B. 116.
[82] (1854) 3 E. & B. 336.
[83] (1841) 1 Q.B. 170.

In the present case, on a like inquiry, I am unable to agree with the answer given by Devlin J. already quoted, that "he "received it for a Crown purpose," if by that language he intended that the income in the custodian's hands was "Crown "income" and applicable exclusively for Crown purposes, that is, public purposes or purposes of the central government. In the absence of some further direction or order on the part of the Treasury or the Board of Trade, the custodian could not lawfully apply the sums in question or any part thereof to any purposes whatever, public or private. He was bound to hold the sums, to keep them, as it were, in medio until such time as he received some effective direction to apply them or otherwise dispose of them as directed—in the event to hand them over to the Administrator of Hungarian Property.

Mr. Russell has argued that during this period of inactivity the beneficial interest of the bank was wholly extinguished; that there was, in truth, no beneficial interest at all in any part of those sums and that there remained accordingly only the legal interest of the custodian. Mr. Russell concedes, of course, that the custodian could not put the moneys in his own pocket. He was bound by statute to hold them as he did; but he, an officer of the Crown, so held them, and the purposes for which he so held them were none the less public purposes because they were negative, more especially since the Crown could at any time (by its executive officers) divert them as it might think fit and since also the aim and object of the vesting and all that followed upon it was none other than the prosecution of the war and the worsting of the King's enemies, matters peculiarly within the ambit of the Sovereign's war-making prerogative.

I have been unable to accept this argument. I cannot agree that during the period of retention by the custodian the rights and interests of the bank were wholly removed or extinguished. The corresponding situation under the Trading with the Enemy legislation of the first world war was considered by Russell J. in the case of *In re Münster*,[84] where he held that the beneficial interests of persons or bodies in the position of the bank in this case must be regarded during the period of retention as being in "statutory suspense." And the ratio of that decision has been held to be equally applicable to similar cases arising under the Trading with the Enemy Act, 1939—by Simonds J. in *In re*

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[84] [1920] 1 Ch. 268.

Gourju's Will Trusts,[85] and by this court in *In re Pozot's Settlement Trusts*.[86]

The conception of beneficial rights being "in suspense" is no doubt at first sight somewhat strange and novel. But, in my judgment, it does not involve—indeed, it negatives—extinction, which would be equivalent to confiscation. So much, to my mind, clearly follows from the language of Russell J., who considered and founded himself on the relevant earlier decisions. I find it sufficient to cite one passage from Russell J.'s judgment in *In re Münster*. He said[87]: "To this reading of the "Act two objections have been raised in argument on behalf of "the Commissioners of Inland Revenue. First, it is said that "this is confiscation, and it is further said that confiscation of "the property of enemy subjects is not the law of this country. "For this latter proposition various statements from different "judgments were cited. Two will serve as examples. In *Hugh* "*Stevenson & Sons, Ld.* v. *Aktiengesellschaft für Cartonnagen*-"*Industrie*,[88] Lord Finlay L.C. says 'It is not the law of this "'country that the property of enemy subjects is confiscated. "'Until the restoration of peace the enemy can, of course, make "'no claim to have it delivered up to him, but when peace is "'restored he is considered as entitled to his property with any "'fruits which it may have borne in the meantime.' Lord "Haldane in the same case remarks[89]: 'The law of this country "'does not in general confiscate the property of an enemy. He "'cannot claim to receive it during war, but his right to his "'property is not extinguished; it is merely suspended.' The "passages no doubt accurately state the law of this country apart "from the provisions of any statute or of the treaty of peace. "Lord Parker in *Daimler Co. Ld.* v. *Continental Tyre and* "*Rubber Co. (Great Britain) Ld.*[90] makes this clear when he "says: 'Subject to any legislation to the contrary or anything "'to the contrary contained in the treaty of peace when peace "'comes, enemy property in this country will be restored to its "'owners after the war just as property in enemy countries "'belonging to His Majesty's subjects will or ought to be restored "'to them after the war.' In my judgment, the Act of 1914 "does not depart from these principles or involve confiscation. "Under its provisions the enemy is deprived of beneficial owner-"ship during the war, and the custodian after the termination

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[85] [1943] Ch. 24.
[86] [1952] Ch. 427, 440.
[87] [1920] 1 Ch. 268, 278, 279.
[88] [1918] A.C. 239, 244.
[89] Ibid. 247.
[90] [1916] 2 A.C. 307, 347.

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BANK VOOR HANDEL EN SCHEEPVAART N.V. v. SLATFORD.

Evershed M.R.

"of the war is bound to deal with it in such manner as His "Majesty (keeping no doubt in view the arrangements made at "the conclusion of peace) may by Order in Council direct. The "second objection urged against this view of the Act of 1914 is "that it involves the existence of a period of time during which "there is no beneficial owner of the property and that this "state of affairs is contrary to ordinary legal conceptions and "principles. That is quite true, but it is the result of a statute "which, in my judgment, causes the beneficial ownership to be "and remain in statutory suspense or abeyance during the period "in question, during which period the custodian has certain "limited powers of dealing with the property."

If it be necessary to define it further, I should say that the formula "statutory suspense" means what it says—that the beneficial interests, though their existence is preserved, are by force of the statute "suspended"; that is, they cannot in our courts be presently asserted and enforced. That the beneficial interests of the bank were liable to be wholly defeated and extinguished, i.e., by an order or direction of the Treasury or the Board of Trade having that effect, I do not doubt. But, pending such diversion, I think that in some real and intelligible sense they remained; and certainly, in the events that have happened, I think they must now unquestionably be taken to have persisted throughout the period of the custodian's retention. Indeed, on no other view (save that of pure gift by the Crown which cannot be supposed) could it properly have been conceded in the court below that the bank was entitled to be paid not only the principal sum but its "fruits" also.

The notion that proprietary rights should be suspended, that they should (wholly or to some extent) not be presently enforceable in the courts is one capable, as was pointed out during the argument, of other illustrations arising out of war-time legislation, for example in the case of mortgagees by virtue of the Courts (Emergency Powers) Act, 1939. Nor is it clear (though it is unnecessary to decide) that a person in the position of the bank could in no circumstances invoke the jurisdiction of our courts to protect and preserve its rights, albeit suspended. Thus, in the case of an individual Dutchman who succeeded in escaping to this country, it is not clear that the courts would not, at his suit, restrain an unauthorized and therefore unlawful diversion of his (former) property by the custodian.

However that may be, I think that the perseverance of the interests of the bank in the sums in question, however remote their character, makes it impossible to say that the sums were held by the custodian exclusively for " public purposes." But, whether or no some discernible interest remained in the bank, still the purposes for which the custodian held the sums, and his duties in respect of them, were purposes and duties of preservation—unless and until he was otherwise directed, and such direction might be in favour of purely private persons or bodies. And the purposes and duties were specifically defined and imposed by statute. They were by nature no less than by the manner of their creation quite distinct, in my judgment, from the prerogative rights of making war or peace—apart altogether from the particular fact that they extended to the property not only of enemies but of nationals of Allied countries whose territory had been overrun by the enemy. No doubt the measures were taken as war measures. But it seems to me impossible to contend, sensibly or by reference to history, that all war measures are manifestations of the Sovereign's war-making prerogative. Total war has been an experience thrust upon twentieth century humanity and has required, for its efficient prosecution, restrictions and controls on property and individual activities never formerly dreamt of. It could not, in my view, be contended that all the many officials appointed by the executive to make effective the machinery of such restrictions and controls were invested with Crown immunity because their purposes were purposes of war. Nor do I think that the case is altered by the circumstance that the duty of preservation imposed by section 7 of the Act of 1939 was expressed to be " in contemplation of arrangements to be " made at the conclusion of peace," for it could not be predicted that such " arrangements " would be exclusively derived from the exercise of the prerogative right of treaty-making or any power strictly analogous thereto. And, finally, in this connexion I attach importance to section 16 of the Act which seems to me to emphasize—if emphasis were necessary—that the particular statutory obligations of collection and preservation imposed upon the custodian were distinct, as by nature they are distinct, from the Sovereign's war-making and other prerogatives, including his right of seizure of the property of his enemies.

If, then, the office of custodian is from the circumstances of its creation distinct in character from those great and ancient offices whose history places them, as it were, close to the Crown and invests them naturally with Crown immunity, and if therefore the availability of " Crown status " for the custodian depends on the nature of his duties and, as regards property in his hands, the purposes for which he must apply it, it seems to me, for the reasons I have given, that unless there is binding authority to the contrary, the true conclusion is that in the present case the custodian was liable to tax in respect of the interest in question.

It remains then only to consider the *Austrian Administrator's* case—*Administrator of Austrian Property* v. *Russian Bank for Foreign Trade* [91]—decided in this court, which Mr. Russell strongly urged was in principle indistinguishable from the present case. In that case the question was whether the administrator (who had been appointed to his office, like the present defendant administrator, not by Order in Council but by the Board of Trade in exercise of a power to appoint conferred by Order in Council) enjoyed Crown immunity from the effect of the then Statutes of Limitation. I will assume that if any official has "Crown "status" so as to be immune from the Limitation Act, he will also have immunity from the Income Tax Act. I have, however, come to the conclusion that the *Austrian Administrator's* case [92] must be distinguished from the present for, in my judgment, the ratio of the former case was that the office of the administrator was created exclusively for the purpose of providing the mechanism for giving effect to the Treaty of Peace made by the Sovereign by virtue of his prerogative treaty-making power and for fulfilling the promises made in the treaty by the Sovereign. That such was the purpose appears from the recital in the Order in Council from which the office was derived—a recital corresponding to that which I have earlier quoted in regard to the Hungarian Peace Treaty Order of 1948. It is true that Scrutton L.J., near the end of his judgment, uses the broad and general language [93]: "The "administrator is an agent of the Crown. He is therefore not "bound by the statute." But earlier in his judgment he had plainly pointed out the nature of the agency. "Now," he said,[94] "in my view he" (that is, the administrator) "is an agent of the "Crown to carry out the promises which the King has made by "virtue of his prerogative." I refer also to the words used by Greer L.J.[95]: "There are some expressions used in some parts "of the treaty and some parts of the order upon which an argu- "ment might be based—to the effect that the order, which has "a statutory effect, seems to assume that the administrator is "not the servant of the Crown, but in my judgment any such

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[91] 48 T.L.R. 37.

[92] 48 T.L.R. 37.

[93] Ibid. 39.

[94] Ibid. 38.

[95] Ibid. 39.

"argument must give way to the logic of the position which is "created by the fact that the Crown gets the rights, which are "to be administered by the administrator, entirely by reason of "its prerogative as the war-making power and the peace-making "power. The Crown has no interest in these debts at all, and "could get none except by the Treaty of Peace confirmed by the "Act of Parliament and the orders made thereunder. Having "got that power by reason of the prerogative, the Crown had to "see what was the wise and right way in which it could use the "property which it had obtained by reason of its prerogative, and "it seems to me that the provisions contained in the Treaty of "Peace and in the order confirming it, especially in the clause "I have read, show that what the administrator is doing is, as "agent of the Crown, distributing the funds which the Crown "has obtained by reason of its prerogative. For these reasons "the Statute of Limitations is just as much inapplicable as if the "words of the order had been 'The King in Council,' though "the words of the order are 'The Administrator of Austrian "'Property.'"

In the result, I am of opinion that the *Austrian Administrator's* case [96] does not bind me to hold otherwise than that the custodian was properly assessable for the sum of income tax here in question. In my judgment, accordingly, the appeal should be allowed and the sum for which the bank is entitled to judgment should be reduced by the amount of such tax.

I add only that this conclusion seems to me to be conformable to common sense. For if the bank is properly entitled not only to the principal sum but also (as it is conceded that it is) to the fruits which the principal sum earned during the period of its retention by the custodian, why should not the bank, like any other person or corporation similarly entitled to interest accrued in another's hands, suffer deduction of tax thereon? In truth, as was pointed out during the argument, the commonly used formula that the Income Tax Act does not bind the Crown conceals the true principle, which is that, in the absence of express provision to the contrary, the Crown and the rights of the Crown are not thereby prejudiced. In the present case, it is plain that the deduction of tax does not touch or affect the personal or prerogative rights of the Sovereign; and it is difficult to see how in any other respect the Crown is prejudiced by the retention for the purposes of the public revenues of part of a sum of interest now treated as having been earned for and payable to the bank.

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[96] 48 T.L.R. 37.

DENNING L.J. As a result of concessions made in the course of the trial, we are left to determine this one question: When the Custodian of Enemy Property invests money in his hands, is he liable to pay income tax on it? The judge has held that he receives "the income as a person having Crown status, or at the "least that he receives it for a Crown purpose"—and is therefore exempt from tax.

This ruling of the judge is based on the maxim that the Crown is not bound by a statute unless expressly named therein. This maxim is, as Mr. Stamp said, too widely expressed. It would be more accurate to say that the Crown is not to be prejudiced by a statute unless it is clear that Parliament intended it should be. The reason for this rule lies in history. The King is historically a constituent part of the legislature and, by assenting to an Act, he cannot be intended to prejudice himself. That is how it was put in the year 1561 in *Willion* v. *Berkley*[97]: "And "because it is not an Act without the King's assent, it is to be "intended that when the King gives his assent, he does not mean "to prejudice himself or to bar himself of his liberty and privilege, "but he assents that it shall be a law among his subjects." It was similarly expressed in 1616 by Lord Coke in his Reports in the case of *Magdalen College.*[98]

Such being the rule which we have to apply, I ask myself: Will the Crown be prejudiced if the custodian is made liable to pay income tax? The answer is plain. The Crown will not be prejudiced at all. The truth is the other way about. The Crown will be seriously prejudiced if the custodian does not pay tax. There is no room, therefore, in this case for applying the maxim. Neither Parliament nor the Crown can ever have intended to exempt the custodian from tax and thus prejudice the public revenue.

A contrary view is only reached by starting with the inaccurate maxim "The Income Tax Acts do not bind the Crown" and then asking: Has the custodian Crown status? as if that settled the matter, whereas it does nothing of the sort. The Attorney-General pointed out the fallacy when he observed that the judge had placed too much emphasis on the status of the custodian and not enough on his activities. If the custodian is to be exempt from paying tax, it is not only because he has Crown status, but also because the income he receives is public revenue, that is, the revenue of the central government. If his income is public

[97] (1561) 1 Plowden 223, 239.

[98] (1615) 11 Co.Rep. 66b.

revenue, it will be exempt. The reason why public revenue is exempt from tax is because there is no point in the Crown taking money from one of its pockets and putting it into another. But if the revenue of the custodian is not public revenue, there is no reason why it should not be taxed. A study of the Trading with the Enemy Acts shows that his income does not go in aid of the public revenue at all. It is held in suspense pending later arrangements. As such it is not exempt from tax.

I would have liked to finish this judgment at this point; but the approach suggested by the Attorney-General is so important that it should be verified from the authorities. These do, I think, support the view that Crown immunity depends, not only on whether the person has Crown status, but also on whether the activity in question is a Crown activity. Thus, in all the rating and taxing cases since 1863, it has been held that exemption from rates depends, not only on whether the occupier has Crown status, but also on whether his occupation is exclusively for Crown purposes: see *Mersey Docks and Harbour Board Trustees* v. *Cameron*,[99] *Greig* v. *University of Edinburgh*,[1] *Coomber* v. *Justices of Berkshire*[2] and *Worcestershire County Council* v. *Worcester Union*.[3] A neat illustration is also to be found in a traffic case. Where an army driver exceeded the speed limit for locomotives, it was held that his immunity depended, not only on the fact that he was a servant of the Crown, but also on the fact that he was exceeding the speed limit exclusively for Crown purposes. If he had exceeded it simply because he liked driving fast, he would not have been immune: *Cooper* v. *Hawkins*.[4]

Not only must the activity be a Crown activity, but also, in accordance with the original rule which I have mentioned, the activity must be such that the Crown purposes would be prejudiced unless immunity were afforded to it. This appears from all the cases. It was the basis of the decision in the *Magdalen College* case,[5] where there was no prejudice to the Crown, and is well illustrated by three modern cases where there was prejudice. The collection of debts to implement a Treaty of Peace—which is a Crown purpose—would be prejudiced if the Administrator of Enemy Property were to be barred by the lapse of time. He is accordingly immune from the Statute of Limitations. That is the *Austrian Administrator* case.[6] The development of Crown property for Crown purposes would be prejudiced if the local authorities could insist on their local Acts being observed unconditionally by the Crown. The Crown is therefore exempt from them: see the *Bombay Province* v. *Bombay Municipal Corporation*.[7] The Defence of the Realm would be prejudiced if the Territorial Association could not recover possession of houses needed for their instructors; and so the Association is immune from the restrictions imposed by the Rent Restriction Acts; see *Territorial and Auxiliary Forces Association of the County of London* v. *Nichols*.[8]

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[99] 11 H.L.C. 443.
[1] (1868) L.R. 1 Sc. & Div. 348.
[2] 9 App.Cas. 61.
[3] [1897] 1 Q.B. 480.
[4] [1904] 2 K.B. 164.
[5] 11 Co.Rep. 66b.
[6] 48 T.L.R. 37.

The immunity can, I think, only be claimed by a person having Crown status. He must be either a servant of the Crown or, at any rate, be in consimili casu: see what Blackburn J. said in the *Mersey Docks* case.[9] But I confess that there are two decisions of a Divisional Court which suggest the contrary. They seem to show that the Crown immunity can be claimed, even by a private person, if it can be shown that Crown purposes would be prejudiced unless immunity were granted to him. One of the cases is *Clark* v. *Downes*,[10] where it was held that a purchaser of Crown property was immune from the Rent Acts as regards a tenancy created by the Crown; for to hold otherwise would prevent the Crown from obtaining a higher price. Talbot J. considered that to be an extreme application of the doctrine of immunity: see *Wirral Estates Ld.* v. *Shaw*.[11] The other case was *Rudler* v. *Franks*,[12] in 1947, where it was held that a tenant who held from the Crown could eject his sub-tenant in spite of the Rent Acts. It does not seem to have been argued in either of those cases that Crown immunity can only be claimed by a person having Crown status. It was, however, raised before this court in *Tamlin* v. *Hannaford*,[13] in 1950, but it was unnecessary to give any decision upon it. The Divisional Courts do not seem to have been referred to some observations of Lord Watson and Lord Bramwell in *Coomber* v. *Berkshire Justices*,[14] which go to show that immunity of Crown property only extends to the Crown interest therein and not to any other interests, and this is, I think, the correct view. The Divisional Court cases have now been overruled in effect by the Crown Lessees (Protection of Sub-tenants) Act, 1952, and need not be further considered.

The question remains, however: What is meant by the

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[7] [1947] A.C. 58.
[8] [1949] 1 K.B. 35.
[9] 11 H.L.C. 443.
[10] (1931) 145 L.T. 20.
[11] [1932] 2 K.B. 247.
[12] [1947] K.B. 530.
[13] [1950] 1 K.B. 18.
[14] 9 App.Cas. 61.

"Crown" in these cases? What is meant when we speak of "Crown status," "Crown activities," "Crown purposes," "Crown interest" and so on?

So far as Crown status is concerned, the Privy Council found no guidance in the phrase "emanation of the Crown." Devlin J. finds none in the phrase "servant or agent of the Crown," although it is the phrase used in the Crown Proceedings Act, 1947. I find no guidance in the phrase "Crown status" by itself. All that can be said is that Crown status attaches to the Ministers of the Crown, to the government departments of which they are the heads, and to the servants of those departments. In this connexion I would observe that the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organization: see *Cassidy* v. *Ministry of Health*[15] in 1951 and *Stevenson Jordan & Harrison Ld.* v. *MacDonald & Evans*[16] in 1951. Outside the Government departments, Crown status also attaches to a number of persons in consimili casu, as Lord Blackburn described them in the *Mersey Docks* case.[17] These are persons who acquire Crown status by acting exclusively for Crown purposes, such as occupiers of assize courts and police stations, the Territorial Associations, and the Administrator of Enemy Property under a Peace Treaty. This category of persons is extremely vague because of the difficulty of deciding what are "Crown purposes." If by "Crown "purposes" is meant the purposes of the executive government, these have been vastly enlarged in the last century. In former days they were almost confined to justice, defence and foreign affairs. Nowadays they include transport, fuel, hospitals, forestry, new towns and indeed almost every purpose beneficial to the public at large. I am quite sure that the great judges who spoke of "the province of government" in the nineteenth century did not mean to include in it the wide range of activities in which governments now embark; and we have recently in this court refused to extend immunity to these activities. The point was distinctly raised in *Tamlin* v. *Hannaford*[18] when Mr. Redmond Barry K.C. (as he then was) said that the real question was "What at this date is the true "province and sphere of central government?" and we answered it by declining to give Crown immunity to the commercial activities of government.

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[15] [1951] 2 K.B. 343.

[16] [1952] W.N. 7.

[17] 11 H.L.C. 443, 464.

[18] [1950] 1 K.B. 18, 21.

We have now to decide whether Crown status attaches to the Custodian of Enemy Property. He is appointed by the Board of Trade, he is subject to a large measure of control by the Board of Trade, the fees he receives go into the Exchequer, and he is paid out of the Consolidated Fund. The present holder of the office, Mr. Slatford, is himself an official of the Board of Trade, he has his office in the Board of Trade, and he may, for aught I know, do work for the Board of Trade when he is not engaged in his work as custodian. All this makes it look at first sight as if he had Crown status. But it does not touch the crucial question, which is: What are his activities? Are they crown activities ? Although the Board of Trade have a large measure of control over him, his activities as custodian are his own activities. They are not Board of Trade activities. Whilst doing them, he is not acting as a servant of the Board of Trade, but as custodian. And, as custodian, he is not implementing any of the Crown's prerogatives, as the administrator was in the case cited. He is collecting debts due, not only to alien enemies, but also to alien friends resident in territory occupied by the enemy. The Crown has no prerogative to seize the property of British subjects or alien friends who are resident, against their will, in territory occupied by the enemy. When the custodian has collected the money, he does not hold it on behalf of the Crown. He holds it pending arrangements to be made later. It is inconceivable that, under those arrangements, the property of alien friends would be confiscated. Even the property of alien enemies would probably be used to pay English creditors. At any rate, all the property is held in suspense. It is not Crown property, and his activities are not Crown activities. He is a public officer carrying out public purposes: but they are not Crown purposes.

The Attorney-General submitted that the burden was on a person asserting Crown immunity to show he was entitled to it. I agree with this submission. In recent years Parliament has set up many corporations, boards, persons and bodies, entrusted them with public duties, paid them out of the public purse, and put them under the direction or control of a Minister. It would be a strong thing for the courts to give these persons Crown immunity when Parliament has not done it. If Parliament has said nothing in the matter, the presumption should be that they are as much subject to the statutes at large as anyone else. They have no special privileges or immunity.

They are under the law. This principle was applied in striking fashion recently when in *Rex* v. *Yorkshire Electricity Board*[19] the electricity authority was heavily fined for doing building work without a licence; and it is most important that it should be maintained. Applying this principle, the Trading with the Enemy Act, 1939, does not say that the custodian is to have Crown immunity. He should not, therefore, be given it by the courts.

For all these reasons, I am of opinion that the custodian has not Crown status. His income is no part of the public revenue and he was liable to pay income tax as he did. The appeal should be allowed.

Romer L.J. I agree that this appeal must be allowed. It cannot be and was not disputed by the bank that if the interest or profits which are in question in this appeal had been received by a private citizen for private purposes, they would have been chargeable to tax under section 1 and Sch. D of the Income Tax Act, 1918. Immunity, however, is sought to be claimed for them from this prima facie liability by an application of the general principle that the Sovereign is, by virtue of the prerogative, exempted from every Act which imposes a tax on the subjects. As the profits now in question never formed part of the personal revenue of the Sovereign, they cannot, as I see it, qualify for protection from taxation under the principle of Crown immunity, unless it can be shown that they were applicable by the custodian, who received them, exclusively for the purposes of the Crown—or, in other words, for public purposes. In my judgment, revenue which is so applicable is exempt from income tax whatever be the status of the recipient; and, on the other hand, income which is received by any servant of the Crown, but is not so applicable, is chargeable to tax notwithstanding the status of the person who receives it. I emphasize this aspect of the matter because it would appear that in the court below attention was mainly concentrated upon the question of the status of the custodian. In my opinion, that point (if relevant to the present problem at all) is material only in so far as it throws light on the one question which is of real significance, viz.: To what purposes could the income under discussion be applied? The importance of this question becomes apparent at once if one considers the position, for example, of a minister who is in charge of one of the spending departments of Her Majesty's Government. Such a minister is undoubtedly a servant of the Crown; but it is as obvious that his own private income is, notwithstanding his status, chargeable to income tax as it is that revenue placed at his disposal for the purposes of his department is not. From this it follows that immunity from taxation of income which is otherwise chargeable attaches (if at all) to the income and not to the recipient—except, of course, in the case of Her Majesty herself. The question, therefore, and the only relevant question for the purposes of the appeal, is whether the purpose to which the profits in the hands of the custodian were applicable were public purposes or not.

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[19] The Times, Nov. 17, 1951.

As a preliminary to this inquiry, it must, of course, be ascertained what is meant by the phrase "public purposes." As to this, the following criteria were laid down by Lord Westbury L.C. in the cases of *Mersey Docks & Harbour Board Trustees* v. *Cameron*[20] and *Greig* v. *University of Edinburgh*.[21] In the former he said that public purposes "must be such as are "required and created by the Government of the country, and "are therefore deemed part of the use and service of the Crown." In the second case he somewhat amplified this definition by saying that such purposes are "the purposes of the administra-"tion of the government of the country."

Was, then, the income in the hands of the custodian applicable to public purposes as so defined? The destination of property which became vested in the custodian was prescribed by the Trading with the Enemy Act, 1939, s. 7, and by the various regulations to which reference has already been made in the judgments which my brethren have delivered. No distinction need be drawn in this regard between the property itself and the income which could be expected to derive from it by reason of the authority which the Board of Trade gave to the custodian to invest it. Under the relevant regulations, then, the assets in the custodian's hands (both capital and income) might, if the Board of Trade so directed, be paid over at any time to or for the benefit of the person who would have been entitled thereto but for the operation of the Act of 1939 or any order made thereunder; subject to this, the custodian was to retain such assets until the termination of the war and thereafter deal with them in such manner as the Board of Trade should direct. In addition, there was the general power of direction exercisable by the Treasury (which was apparently never in fact exercised) established by paragraph 4 of the Defence (Trading with the Enemy) Regulations,

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[20] 11 H.L.Cas. 443, 505.

[21] L.R. 1 Sc. & D. 348, 354.

1940. Unless and until some direction was given to the custodian by the Board of Trade or the Treasury, the ultimate destination of the assets remained uncertain. Two things, however, at least were clear. The first was that the assets might at any time during the war be restored to their former owner. The second (which in fact occurred) was that they might be so restored after the war was over. In view of these manifest possibilities, it seems to me impossible to say—as, in my judgment, must be said if the bank are to succeed—that the only purposes to which the assets could properly be applied were "the "purposes of the administration of the government of the "country."

This view of the matter appears to me to be destructive of the bank's case. It was argued on their behalf that the custodian cannot be assessed to income tax under rule 1 of the Miscellaneous Rules applicable to Sch. D because he possesses Crown status. This contention, however, is essentially interlocked with the question whether or not the income which he receives is applicable to public or to private purposes. If the former, cadit quaestio—for the income itself is immune from taxation and consequently no question of assessment arises; if the latter, he is just as liable to assessment as is any servant of the Crown in respect of income which he receives for private purposes.

There are only two further points which I should like to mention. The first is that I agree that, for the reasons which the Master of the Rolls has indicated, the conclusion at which we have arrived is in no way inconsistent with the case of the *Administrator of Austrian Property* v. *Russian Bank for Foreign Trade*.[22] Secondly, I entirely concur with the Master of the Rolls' observations with regard to the "suspense" of beneficial rights in relation to enemy property during such time as the property remains vested in the custodian; and to those observations I have nothing to add. Accordingly, I agree that this appeal should be allowed.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor, Board of Trade; Hardman, Phillips & Mann.*

B. A. B.

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[22] 48 T.L.R. 37.

C. A.

1952
Dec. 17, 18.

Somervell,
Jenkins and
Hodson L.JJ.

BRADLEY-HOLE *v.* CUSEN.

[Plaint No. H. 272.]

Landlord and Tenant—Rent restriction—Controlled premises—Payment of rent in excess of standard rent—Right of tenant to deduct excess from subsequent rent payments—Bankruptcy of landlord—Claim by trustee in bankruptcy to recover subsequent rent in full —Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 14 (1).

The defendant, the tenant of rent controlled premises, having paid to the landlord rent in excess of the standard rent, was entitled under section 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to recoup himself by deducting the excess from subsequent payments of rent to the landlord. A receiving order in bankruptcy having been made against the landlord, the trustee in bankruptcy sued the tenant for the full rent, and the county court judge, deeming himself bound by the dicta of Cohen L.J. in *Kitchen's Trustee* v. *Madders* [1950] Ch. 134, 148; [1949] 2 All E.R. 1079, held that the right of deduction claimed by the tenant was not available against the trustee in respect of rent due from the date of the bankruptcy. On appeal:—

Held, that the reversion expectant on the determination of the tenant's interest vested in the trustee in bankruptcy subject to all the rights of the tenant against the landlord, including the tenant's statutory right under section 14 (1), which was to be considered, in effect, as between the tenant and the landlord, as rent which the tenant had paid in advance.

Principle stated by Romer L.J. in *Bendall* v. *McWhirter* [1952] 2 Q.B. 466, 487; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307, applied.

Dicta of Cohen L.J. in *Kitchen's Trustee* v. *Madders,* supra, explained and distinguished.

Appeal from Judge Archer, sitting at Hastings county court.

The defendant, John Charles Cusen, as tenant of a rent-controlled house, No. 27 Magdalen Road, St. Leonards-on-Sea, claimed to deduct, under section 14 (1) [1] of the Increase of Rent

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[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 14 (1), as amended: "Where any "sum has, since the beginning of September 1, 1937, been paid on account "of any rent or mortgage interest, "being a sum which is by virtue of "this Act irrecoverable by the land-"lord or mortgagee, the sum so paid "shall be recoverable from the land-"lord or mortgagee who received the "payment or his legal personal repre-"sentative by the tenant or mort-"gagor by whom it was paid, and "any such sum, and any other sum "which under this Act is recoverable "by a tenant from a landlord or pay-"able or repayable by a landlord to "a tenant, may, without prejudice to "any other method of recovery, be "deducted by the tenant or mortgagor "from any rent or interest payable "by him to the landlord or mort-"gagee."

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and Mortgage Interest (Restrictions) Act, 1920, from subsequent rents as they became payable, sums which he had paid to the landlord, Mrs. Annie Smith, in excess of the standard rent of the house. On August 23, 1951, a receiving order was made against the landlord, and the present plaintiff, having been appointed her trustee in bankruptcy, claimed to be entitled to recover from the tenant, as from the date of the bankruptcy, the full standard rent without deduction under section 14 (1).

The county court judge held that the right of deduction claimed to be exercisable by the tenant under section 14 (1) of the Act of 1920 was not available against the trustee in bankruptcy. He based his decision on the observations of Cohen L.J. in *Kitchen's Trustee* v. *Madders.*[2]

The tenant appealed.

L. A. Blundell for the tenant.
Muir Hunter for the trustee.

The arguments of counsel are adequately set out in the judgment of Jenkins L.J.

SOMERVELL L.J. I will ask Jenkins L.J. to deliver the first judgment.

JENKINS L.J. This is an appeal from a judgment of Judge Archer concerning the right claimed by the defendant tenant, a Mr. Cusen, to deduct in respect of his tenancy of 27 Magdalen Road, St. Leonards, rent overpaid by him to the landlord in excess of the rent lawfully recoverable under the provisions of the Rent Restriction Acts. It appears that whereas the standard rent of the premises under the Acts was 15s. 6d., and there were permitted increases which brought the rent up to a maximum of some 19s. 5½d., a substantially larger weekly rent was, in fact, reserved and paid. In the ordinary way, there would be no difficulty in the matter, as the provisions of section 14 (1) of the Act of 1920 would enable the tenant, having made those overpayments, to recover them from the landlord to whom they were made or, alternatively, to deduct them from subsequent rent payable, at all events to that landlord. The difficulty in the case is that on August 23, 1951, a receiving order was made against the landlord, and on September 21, 1951, the plaintiff was appointed the landlord's trustee in bankruptcy. The question thus arises whether the right of deduction given by section 14 (1) of the Act of 1920 is exercisable against the trustee in bankruptcy of the landlord.

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[2] [1950] Ch. 134, 148; [1949] 2 All E.R. 1079.

[His Lordship read section 14 (1) of the Act of 1920, and continued:] In conjunction with those provisions it is necessary to look at section 12 (1) (*f*) of the Act, which provides: "The "expressions 'landlord,' 'tenant,' 'mortgagee,' and 'mortgagor' "include any person from time to time deriving title under the "original landlord, tenant, mortgagee, or mortgagor." If the expression "the landlord," where it occurs at the end of section 14 (1) in the passage "may, without prejudice," and so on, "be deducted by the tenant or mortgagor from any rent or "interest payable by him to the landlord or mortgagee" means, in accordance with the definition, the landlord or any person from time to time deriving title under him, it would seem that the trustee in bankruptcy's claim in this case would be fraught with great difficulty for, on that construction, the statute would have provided a statutory right of deduction in terms exercisable against the landlord for the time being, which would, so far as I can see, include the trustee in bankruptcy as one of the possible successors in title of a landlord. There is, however, some authority to the effect that the expression "the landlord" in that passage is limited by the context to the landlord who receives the excess payment. That authority is provided by the Irish case of *Murray* v. *Webb*.[3] It was there held that on its true construction the expression "the landlord" in that passage was confined to the landlord who had been overpaid. Speaking for myself, I desire to keep that question of construction open for determination if and when it becomes necessary to decide it in some other case. For the purposes of the present case, I am prepared to assume that the construction placed on it by the Irish court was the right one, so that the only right of deduction given by section 14 (1) is a right of deduction against the overpaid landlord as distinct from a successor in title of the overpaid landlord. Mr. Blundell, for the tenant, invited us, in effect, to deal with the matter on that footing, and that is how I propose to deal with it.

The county court judge came to the conclusion that the right of deduction claimed to be exercisable by the tenant was not, as contended by the tenant, available against the trustee in respect of rent accrued to the trustee from the time of the bankruptcy.

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[3] (1925) 59 Ir.L.T. 41.

The note of his reasons (which is very brief) is in these terms: "Although there is no reference to or argument on section 14, "it appears that what Cohen L.J. held in *Kitchen's Trustee* v. "*Madders* [4] involves the point in his judgment at the end where "he deals with the sum recoverable." Accordingly, the judge rejected the tenant's contention and gave judgment in favour of the trustee for the full amount of recoverable rent, claimed by the trustee, accrued since the bankruptcy. It is true that in *Kitchen's Trustee* v. *Madders* [4] there was a claim in respect of rent overpaid of a similar nature to the claim in this case. It was an exceedingly complicated case, but the only aspect of it material for the present purpose is this: the trustee in bankruptcy of a landlord sued the defendants for five quarters' rent due under a tenancy granted to them by the bankrupt landlord. Two of those quarters' rent had accrued due before the bankruptcy, and three had accrued due after the bankruptcy. In the court below, the case had been argued with reference to a set-off claimed in respect of an entirely different matter into which I need not now enter; but in this court the defendants were allowed to introduce, by amendment, a claim to the effect that the premises comprised in the tenancy were subject to the protection of the Act and that the rent claim by the trustee was in excess of the recoverable rent and, moreover, that the defendants had paid rent in excess of the recoverable rent and were, therefore, entitled to deduct or set off the excess payments they had made against the rent claimed by the trustee. The effect of the deduction or set-off which they claimed to make, as I understand it, was to exhaust the two quarters' rent claimed in respect of periods before the bankruptcy and to leave a balance of overpaid rent amounting to £20 which, as I understand it, they sought to set off against the rent accrued due after the bankruptcy.

There seems to have been no argument addressed to the court on the point which has been debated before us. Cohen L.J., after referring to the amendment raising the defence based on the Rent Act, and discussing and deciding in favour of the defendants the question whether the premises were a dwelling-house to which the Act applied, went on [4]: "It seems to me "that those facts reinforce the conclusion to which the Master "of the Rolls came, and that there is nothing in the terms of the "lease which can prevent us from holding that this house was "at the material time a dwelling-house within the meaning of the

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[4] [1950] Ch. 134, 148.

"Acts. The effect of that, of course, is that the rent was payable only at the rate of £140 a year instead of at the rate of "£500 a year. On that basis, Mr. Browne claims that the sum "recoverable, instead of being £625, should be £85. In making "that calculation, however, he went too far, because he tried "to set off the £90 (which his clients had overpaid for the "quarter's rent paid in advance), not only against the first two "standard quarters' rent aggregating £70, as to which it was "clearly a proper subject-matter of set off, but also (to the "extent of £20) against the rental accrued due"—and then there are these words—"after the institution of this action" which should, I think, have been "after the commencement of the "bankruptcy." The Lord Justice continued: "For the reasons "already given I do not think that the set-off can be applied as "regards the last three quarters' rent. In my view, therefore, "the proper sum for which judgment should be entered for the "plaintiff is three quarters' standard rent, that is, £105."

As I understand it, "the reasons already given," as the Lord Justice called them, were, in effect, these: he said[5]: "As to "the last three quarters' rent which accrued due after the commencement of the bankruptcy, there was, I think, no mutuality "and, therefore, there could be no set-off." The Lord Justice was referring there to a claim to set off an amount entirely different from the excess rent, namely, a judgment debt which would, apart from the bankruptcy, have been recoverable against the debtor. The ground for refusing a set-off was that there was no mutuality because the judgment debt was a debt which had become due from the debtor before the bankruptcy whereas the rent against which it was sought to set it off was rent accrued after the bankruptcy. Again, the Lord Justice said[6]: "Here "we are considering instalments of rent which accrued due for "the first time after the commencement of the bankruptcy; we "are considering, therefore, debts which were never due to the "bankrupt but which became due to the trustee. It seems to "me in those circumstances impossible to say that there is such "mutuality between the claim for rent due to the trustee and "the claim for fraudulent misrepresentation against the bankrupt as to found a right to set off within section 31 of the "Bankruptcy Act, 1914. For these reasons I think that the "judge was right when he rejected the defence based on set-off."

Accordingly, if I am not mistaken, all that was decided in

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[5] [1950] Ch. 134, 143.

[6] Ibid. 145.

Kitchen's Trustee v. *Madders*[7] which has any bearing on the present case was that where rent had been overpaid in respect of premises subject to the Rent Acts, the resulting claim was not a proper matter for set-off, under section 31 of the Bankruptcy Act, 1914, against rent accruing due to the trustee subsequent to the commencement of the bankruptcy. The argument which has been addressed to us, based on the language of section 14 of the Act of 1920 and the statutory right of deduction for which it provides, does not appear to have been raised at all, and, accordingly, notwithstanding the decision in *Kitchen's Trustee* v. *Madders*[7] I conceive that the point is open in this court.

Mr. Blundell's argument for the tenant, which I summarize, on the assumption that the narrow construction of the expression "the landlord" where it last appears in section 14 (1), is the right one, is in effect of this nature: all the property of the bankrupt vested in the trustee: that included, amongst other things, the reversion expectant on the determination of the tenant's interest in 27 Magdalen Road, St. Leonards. The trustee thus became entitled to receive whatever rent was payable by the tenant in respect of the premises; but the reversion passed to the trustee not only with that right but also subject to the statutory obligation which the landlord was under to submit to the deduction from the rent currently payable of the rent previously paid in excess of the lawful recoverable rent. That argument was, in his submission, supported by the reasoning which underlies the decision of this court in *Bendall* v. *McWhirter*.[8] That was a case where a deserted wife was living in the matrimonial home which was the property of the husband. The husband was adjudicated bankrupt; the freehold of the house vested in his trustee in bankruptcy. The trustee brought an action to recover possession and mesne profits against the wife as a trespasser from the date of the adjudication in bankruptcy. The county court judge made an order for possession. On appeal it was held in this court, first, "that a deserted wife in occupa-"tion of the matrimonial home has a personal licence, revocable "by her husband only by obtaining an order of the court under "section 17 of the Married Women's Property Act, 1882"; secondly, "that where the matrimonial home is a freehold house "which vests in the husband's trustee in bankruptcy under the "provisions of the Bankruptcy Act, 1914, the trustee takes the

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[7] [1950] Ch. 134.

[8] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

"house subject to the wife's licence, and cannot obtain possession of it without an order of the court which could be made "on an application for possession under section 105 (1) of the "Bankruptcy Act, 1914," and *per* Somervell and Romer L.JJ., "The trustee takes no better title than the bankrupt had. He is "no more entitled than was the debtor before his bankruptcy to "revoke the wife's licence on his own authority or to sue her for "possession of the property."

That case deals with an entirely different set of circumstances, but to my mind it is of great assistance in the present case for this reason: the right of the wife and the obligation of the husband there under consideration were a personal right and a personal obligation depending upon the relationship of husband and wife which subsisted between those two parties. Yet, it was held that the trustee in bankruptcy could not disregard the wife's interest. That shows, I think, that although it has been said in some cases that the trustee in bankruptcy is simply the assignee, like any other assignee, of all the property of a bankrupt divisible amongst the creditors, that unqualified statement does not provide a universally adequate definition of the trustee's position for, if it were an exhaustive and accurate definition of his position, the decision in *Bendall* v. *McWhirter*[8] must, as it seems to me, have gone the other way. There, the wife was in a position comparable to that of the tenant, and the husband was in a position comparable to that of the landlord in the present case. The husband was under a personal obligation to his wife, based on their relationship, to permit her to remain in the matrimonial home. If the trustee was simply in the position of an ordinary assignee of the house, I should have thought that there would be grave difficulty in seeing how there was any interest in the wife which could override his interest as assignee, for the husband's obligation to the wife was, as I have said, a purely personal obligation.

Accordingly, as it seems to me, it really matters not in the present case that, according to the construction of section 14 (1) on which I am basing this judgment, the right of deduction claimed by the tenant here would not have been exercisable against an ordinary assignee of the landlord. As *Bendall* v. *McWhirter*[8] shows, the trustee in bankruptcy steps into the shoes of the debtor and takes the debtor's property subject to all clogs or fetters or liabilities affecting it in the hands of the debtor himself. The position is well stated in the passage from

[8] [1952] 2 Q.B. 466.

Halsbury's Laws of England, referred to by Romer L.J. in *Bendall* v. *McWhirter*.[9] The passage from Halsbury's Laws of England, 2nd ed., vol. 2, p. 209, says this: "The "property of the bankrupt passes to the trustee in the same "plight and condition in which it was in the bankrupt's hands, "and is subject to all the equities and liabilities which affected "it in the bankrupt's hands, and to all dispositions which have "been validly made by the bankrupt, and to all rights which "have been validly acquired by third persons at the commencement of the bankruptcy, unless the property which the trustee "takes is released by some express provision of the bankruptcy "law."

Mr. Muir Hunter, in his interesting and helpful argument to the contrary, referred to a number of well-known cases on the question of the right of set-off, beginning with *Titterton* v. *Cooper*,[10] which he cited to illustrate the position of the trustee in bankruptcy in regard to leasehold property of the debtor. He used that case, in effect, to support the proposition that the trustee in bankruptcy comes in like any other assignee by a new title which, in the absence of disclaimer, may make him personally liable for the rent under the lease; but he is not liable for any breach of covenant happening before his appointment. It is suggested that similarly in the present case the trustee, coming in on his appointment as assignee of the reversion subject to the appellant's tenancy, was not liable for or concerned with any matter such as the overpayment of rent to the bankrupt landlord which had happened before his appointment.

Nearer the actual question is *Alloway* v. *Steere*,[11] where the tenant was a "tenant from year to year of a farm upon the "terms that, at the expiration of the tenancy, he should be "paid by the landlord allowances for tillages and cultivation "according to the custom of the country." The tenant went bankrupt. A trustee was appointed. He did not disclaim the tenancy, and carried on the business of the farm for the benefit of the creditors. "The debtor's estate was sufficient to in"demnify the trustee against any personal liability in respect of "the tenancy. In an action to recover the value of tillages "and cultivation by the trustee during his tenancy, according "to the custom: *Held*, that the landlord was not entitled to "set off rent, accrued due from the debtor before the liquidation "proceedings, against the trustee's claim."

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[9] [1952] 2 Q.B. 466, 487.

[10] (1882) 9 Q.B.D. 473.

[11] (1882) 10 Q.B.D. 22.

The matter was very fully argued on behalf of the landlord by Mr. Vaughan Williams (as he then was) and I should, perhaps, read some of the passages relied on by Mr. Muir Hunter. Denman J. in his judgment referred to *In re Sneezum*,[12] and said[13]: "In that case the question was not "as to the right of set-off, but as to the right of proof—a wholly "different thing. There may be a right here on the part of "the landlord to prove for his rent, but that fact creates no "analogy between the cases. No case has gone the length of "deciding that where the trustee takes to a lease or tenancy, "and carries on the business of the farm, and becomes entitled "to get from the landlord a return of monies which have been "expended for the benefit of the farm, the landlord shall "have, not only his right of proof against the debtor's estate, "but shall also be entitled to set off against monies actually "expended by the trustee in tillage and cultivation, of which "the landlord gains the benefit, sums due from the debtor for "rent accruing before the commencement of the trustee's "interest." Manisty J. said[14]: "The relative rights and "liabilities of the landlord and the trustee appear clearly from "the case of *Titterton* v. *Cooper*,[15] where the whole question "was fully considered, and the conclusion arrived at by the "Court of Appeal was that a trustee in bankruptcy, not dis-"claiming, was in the position of an ordinary assignee of the "lease, and as such liable for the rent, and for the performance "of the covenants during the time the lease was vested in "him. . . . Supposing it had been the case of an ordinary assign-"ment; the assignee of the tenancy is bound under his contract "to go on spending money on the farm, of which the landlord "obtains the benefit; on what principle could it be said that "when the tenancy comes to an end the landlord has a right of "equitable set-off in respect of rent accrued due before the "assignment, or in respect of damages for breach of covenant "or contract accruing before the assignment? The statute has "made no provision that there should be any such right of "set-off in the case of bankruptcy, and I cannot see upon any "principle or authority how the defendant's claim to a set-"off can be supported; the plaintiff being, as I have said, in the "same position as any other assignee." As I have already observed, I think that that last statement, that the plaintiff is in the same position as any other assignee, is as a general proposition too widely expressed, and is not entirely accurate to describe the position of a trustee in bankruptcy in all circumstances.

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[12] (1876) 3 Ch.D. 463.

[13] 10 Q.B.D. 22, 27.

[14] Ibid. 29.

[15] 9 Q.B.D. 473.

We were also referred by Mr. Muir Hunter to *In re Wilson, Ex parte Lord Hastings*.[16] That was another case of an agricultural tenancy, where the tenant went bankrupt, and the question again arose as to setting off rent against the outgoing valuation. The interesting point about that case was that the result was the opposite of *Alloway* v. *Steere* [17] on account of a custom in the county of Norfolk. I think that the effect of the decision is sufficiently stated in the headnote: "*Held*, that "under section 38 of the Bankruptcy Act, 1883, the landlord "had no right to set off the one sum against the other. But "that the court was of opinion on the evidence that as a matter "of fact, according to the custom of the county of Norfolk, "the amount payable by the landlord in respect of valuation "to the outgoing tenant was not the absolute value put by the "valuers on the subject matter of the valuation, but was the "balance of that sum after deducting any arrears of rent; and "that that being so, the landlord in the present case was not liable "to pay any part of the £271 to the trustee." So that there, by custom, the tenant's right was to receive only the balance represented by the amount of the valuation less the arrears of rent, and that custom was held binding on the trustee in bankruptcy.

Mr. Muir Hunter claimed, in effect, that this case does not differ from cases concerned with set-off such as those to which I have referred. He said that, on the principles of *Alloway* v. *Steere*,[17] there can be no right of set-off in the present case; that the claim in respect of overpaid rent had been converted simply into a right of proof; and that any other method of recovering it was barred by section 7 of the Bankruptcy Act, 1914. He claimed that it would be contrary to the principles of the bankruptcy legislation to give the tenant the right of deduction claimed, which would, in effect, give him an undue preference over the general body of creditors.

In my view, Mr. Blundell's argument should prevail in this case. I accept all that Mr. Muir Hunter said so far as ordinary cases of set-off are concerned, but this is not, as I understand it, an ordinary case of set-off. Here, there is a statutory right given to the tenant to deduct the overpayment of rent from the rent currently payable until overpayments are satisfied. The effect of that, as I understand it, is that as against the landlord who was overpaid, namely, the bankrupt landlord in the present case, the tenant was entitled by virtue of section 14 (1) to remain in the premises rent free until such time as the amount of the lawfully recoverable rent accruing due under the tenancy should have sufficed to recoup to the tenant the amount of the overpaid rent. Applying the principle stated in *Bendall* v. *McWhirter*,[18] for my part I see no reason why a right of that sort should not be binding on the trustee in bankruptcy of the landlord or why the trustee in bankruptcy should, in regard to such a right, be in any better position than the bankrupt personally would have been. In my view, the reversion expectant on the determination of the tenant's interest vested in the trustee in bankruptcy subject to all the rights of the tenant, including, in particular, the tenant's right under section 14 (1) of the Act of 1920, to be considered, in effect, as between himself and the bankrupt landlord as having paid rent in advance up to the amount of the rent in fact paid in excess of the rent lawfully recoverable under the Act.

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[16] (1893) 10 Morrell 219.

[17] 10 Q.B.D. 22.

For these reasons, as in my view the point cannot be regarded as having been concluded in *Kitchen's Trustee* v. *Madders*[19] against the contention now advanced by Mr. Blundell on behalf of the tenant, I would allow this appeal.

SOMERVELL L.J. I agree with the conclusion to which my brother has come and with the reasons which he has given for it. I only want to add that I can quite understand that the county court judge should feel he ought to follow the statement in *Kitchen's Trustee* v. *Madders*.[19] But in this court, for the reasons my brother Jenkins has given, the point is, in my opinion, open for us to consider.

HODSON L.J. I agree, and have nothing to add.

Appeal allowed.

Solicitors: *Preston, Lane-Claypon & O'Kelly, for John Ray & Son, Hastings; H. Boustred & Sons, for Percy Walker & Co., Hastings.*

A. W. G.

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[18] [1952] 2 Q.B. 466.

[19] [1950] Ch. 134.

REGINA *v.* ROGERS.

C. C. A.

1952
Dec. 17.

Lord Goddard C.J., Hilbery and Hallett JJ.

[1952 No. 1091.]

Criminal Law—Sentence—Preventive detention—Corrective training—Convictions on "previous occasions"—Two convictions on one indictment—Meaning of "previous occasions"—Court's omission per incuriam to make order to report on discharge—Whether sentence may be altered by addition of omitted order—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *ss.* 21 (1), (2); 22 (1), (3); 23 (1).

The Criminal Justice Act, 1948, by section 21 (2) provides that a sentence of preventive detention may be imposed on a person who inter alia "(*b*) has been convicted on indictment on at least "three previous occasions." By section 21 (1) corrective training may be imposed on a person who has been convicted "on at least "two previous occasions"; and by section 22 (1) persons who have been convicted "on at least two previous occasions . . ." shall be ordered to be subject to the provisions of that section, unless the court otherwise determines.

The appellant was convicted on indictment of housebreaking and larceny. Notice was served on him under section 23 (1) of the Act of 1948 specifying as convictions on "three previous occasions" a conviction at Wiltshire Quarter Sessions and convictions on two counts of one indictment at Dorsetshire Sessions. The deputy chairman held that since it was doubtful whether the second and third convictions were on two separate "occasions" within the meaning of section 21 (2) (*b*), the court had no jurisdiction to impose a sentence of preventive detention, and imposed a sentence of imprisonment. In so doing, he omitted per incuriam to make an order under section 22 of the Act of 1948. On appeal by the prisoner against the sentence:—

Held, (1) affirming the decision of the deputy chairman, that the word "occasions" where it occurs in section 21 (1) (*b*) and (2) (*b*) and in section 22 (1) (*a*) of the Act of 1948, means separate appearances before a court, and that two convictions of the same man at the same sessions or assizes are not convictions on two separate occasions;

(2) that where a court omits per incuriam to make an order as required under section 22 of the Criminal Justice Act, 1948, the Court of Criminal Appeal may, either on application for leave to appeal or on hearing the appeal against sentence, alter the sentence by making the order. The governor of the gaol may also make inquiry to discover whether such order had been omitted per incuriam and may call the attention of the court to such omission.

APPEAL against sentence.

The appellant, Raymond Richard Rogers, was convicted at Dorsetshire Quarter Sessions on charges of housebreaking and larceny. Notice had been served on him under section 23 (1) of the Criminal Justice Act, 1948,[1] and the following previous convictions against him were proved: (1) a conviction at Wiltshire Quarter Sessions; (2) and (3), convictions both on the same day on two counts of an indictment at Dorsetshire Sessions. The court called attention to the provisions of section 21 and the deputy chairman, Mr. G. D. Squibb, expressed doubt whether the court had jurisdiction to pass a sentence of preventive detention, since the Act required that the accused should have been convicted on at least three previous occasions, and the question arose whether two convictions on the same day at the same sessions on two counts of the same indictment could be regarded as convictions on two separate occasions. The court accordingly passed sentences of three years' and five years' imprisonment to run consecutively.

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[1] Criminal Justice Act, 1948, s. 21: "(1) Where a person who is "not less than twenty-one years of "age—(*a*) is convicted on indictment "of an offence punishable with imprisonment for a term of two years "or more; and (*b*) has been convicted on at least two previous "occasions since he attained the age "of seventeen of offences punishable "on indictment with such a sentence, "then, if the court is satisfied that it "is expedient with a view to his "reformation and the prevention of "crime that he should receive training of a corrective character for a "substantial time, followed by a "period of supervision if released "before the expiration of his sentence, the court may pass, in lieu "of any other sentence, a sentence of "corrective training for such term of "not less than two nor more than four "years as the court may determine.

"(2) Where a person who is not "less than thirty years of age—"(*a*) is convicted on indictment of "an offence punishable with imprisonment for a term of two years "or more; and (*b*) has been convicted on indictment on at least "three previous occasions since he "attained the age of seventeen of "offences punishable on indictment "with such a sentence, and was on "at least two of those occasions sentenced to Borstal training, imprisonment or corrective training; "then, if the court is satisfied that "it is expedient for the protection "of the public that he should be "detained in custody for a substantial "time, followed by a period of supervision if released before the expiration of his sentence, the court may "pass, in lieu of any other sentence, "a sentence of preventive detention "for such term of not less than five "nor more than fourteen years as the "court may determine. . . ."

"22.—(1) Where a person is convicted on indictment of an offence "punishable with imprisonment for a "term of two years or more and that "person—(*a*) has been convicted on "at least two previous occasions of "offences for which he was sentenced "to Borstal training or imprisonment; or (*b*) has been previously "convicted of an offence for which he "was sentenced to corrective training, "the court, if it sentences him to a "term of imprisonment of twelve "months or more, shall, unless "having regard to the circumstances, "including the character of the offender, it otherwise determines, order "that he shall for a period of twelve "months from his next discharge "from prison be subject to the provisions of this section. . . ."

"(3) It shall be the duty of the "governor of a prison on the discharge from prison of an offender "against whom an order has been "made under this section to serve "upon him a notice stating the effect "of the order. . . ."

"23.—(1) For the purpose of determining whether an offender is liable "to be sentenced to corrective training or preventive detention or to be "ordered to be subject to the provisions of the last foregoing section, "no account shall be taken of any "previous conviction or sentence unless notice has been given to the "offender and to the proper officer of "the court at least three days before "the trial that it is intended to prove "the conviction or sentence; and "unless any such previous conviction "or sentence is admitted by the offender the question shall be determined by the verdict of a jury."

By an oversight, the deputy chairman omitted to make an order under section 22 of the Criminal Justice Act, 1948.

The prisoner applied for leave to appeal against sentence, and the Court of Criminal Appeal granted him leave on December 1, 1952. In giving their reasons they expressed the view that it might be of assistance both to judges and to chairmen of quarter sessions if the point of law as to the meaning of "previous "occasions" in sections 21 and 22 of the Act of 1948 were cleared up, since the circumstances were liable to arise frequently; and they directed that the point should be argued on both sides. The court also directed that counsel should address them on the question whether, where a chairman of quarter sessions had omitted per incuriam to make an order under section 22 against the prisoner, the Court of Criminal Appeal might order that addition to be made to the sentence imposed at quarter sessions without formally giving leave to appeal.

The prisoner appealed against the sentence of imprisonment.

Henry Elam for the appellant. The legislature intended to provide by section 21 (2) of the Criminal Justice Act, 1948, that a sentence of preventive detention should be imposed in cases where three terms of imprisonment had already failed to have any effect, so that something else ought to be tried. It was not intended that convictions on indictments on the same day and at the same place should count, for there might be three or even 33 such indictments. Strictly, a conviction on each count of an indictment might be held to be a conviction on a separate "occasion," because each count of an indictment is a separate indictment. But that was not what was intended by the legislature.

J. H. Buzzard for the prosecution. The meaning of the word "occasion" has been considered in two cases with reference to the provisions of section 506 of the Merchant Shipping Act, 1854, where the phrase was used in connexion with the liability of the owners of a ship for loss of or damage to goods "arising on distinct "occasions." In *The Rajah*[2] it was held that where a ship was involved in a collision with two other ships substantially though not actually at the same moment of time, the damage was to be assessed on the basis that there were not two distinct occasions but one only. In *The Schwan, The Albano*,[3] it was held that two occasions might be separated by an interval of a few minutes only.

The Oxford English Dictionary defines "occasion" as "the "time or one of the times at which something happens," and the question here is whether the appellant has been convicted at least three times within the meaning of that definition. It is submitted that the plain meaning of the words "convicted on indictment on "at least three previous occasions" is convicted at least three times, and that the language does not require that there should be separate convictions at different assizes or quarter sessions. If that is so, the deputy chairman was wrong in holding that he had no jurisdiction to impose a sentence of preventive detention.

Elam in reply. I rise, your Lordships, for the second time on this, the same "occasion."

LORD GODDARD C.J., delivering the judgment of the court, stated the facts briefly, and continued:—The deputy chairman said that he was not satisfied that the court had jurisdiction to pass a sentence of preventive detention because the Criminal Justice Act, 1948, by section 21 (2), provided that the person in question must have been convicted on indictment on at least three previous occasions. Unfortunately there had not been three previous convictions on indictment in the present case, unless the two convictions at the Dorsetshire Sessions on the same day on two counts of the same indictment could be regarded as convictions on two separate occasions.

This court gave leave to appeal because, though they had no doubt that the sentence of eight years in the aggregate passed by sessions was, in the circumstances, right in point of time, it was obvious that a point of great importance was raised because similar circumstances might easily arise over and over again at any assizes or at any quarter sessions: the court therefore desired to consider the meaning of the words "at least "three previous occasions." Do they mean at least three separate appearances before a court, or do they mean three different convictions, of which separate records of conviction can be drawn up? I do not think I can put it better than by asking if a man has appeared before, let us say, the Central Criminal Court in the January sessions, and has there pleaded guilty either to an indictment containing three counts, or to three separate indictments, all at the same sessions, has he, if he subsequently commits an offence, been convicted on three previous occasions, so that he can be sent to preventive detention?

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[2] (1872) L.R. 3 Adm. & Ecc. 539.

[3] [1892] P. 419; 8 T.L.R. 425.

The statute in fact uses the expression "previous occasions" in two other places, once in the same section—section 21 (1) (*b*)—and again in section 22 (1) (*a*). Section 21 (1) (*b*) is concerned with corrective training, and provides, among other things, that a man must have been convicted on "at least two previous "occasions . . . of offences punishable on indictment with" two years' imprisonment, though he need not have been *convicted* on indictment. Section 22 (1) provides: "Where a person is con- "victed on indictment of an offence punishable with imprison- "ment for a term of two years or more and that person—(*a*) has "been convicted on at least two previous occasions of offences for "which he was sentenced to Borstal training or imprisonment," and so on, an order under that section shall be made requiring him to report when he comes out of prison.

There are thus at least three places where the words "previous occasions" are used, and in the opinion of the court the same interpretation must be put on those words in the corrective training subsection and in section 22 as the court puts on them in regard to section 21 (2), that is, the subsection on preventive detention. Where an expression like "previous "occasions" is used twice in one section and once in the following section, the same construction must be put on it.

We have received great assistance from counsel in this case, and it is a short point; but it does not follow that it is in all respects an easy point. The first thing is to consider what are the provisions of this Act with regard to preventive detention. We have to remember that there was a previous Act, the Prevention of Crimes Act, 1908, which provided for preventive detention, but that was preventive detention of persons who had been found by a jury to be habitual criminals. Those of us who practised in days gone by remember how difficult it was to steer through the mass of cases concerning habitual criminals—to find what had to be proved, what direction had to be given to a jury, and so forth. Therefore, convictions of people as habitual criminals and sentences of preventive detention under that Act were very few. Parliament has altered that, and the present Act enables the court to hold, on proof of a certain number of convictions, that a person is qualified for preventive detention; and although we said in *Rex* v. *Askew* [4]—and I emphasize this because I think that it has been somewhat misunderstood—that preventive detention was meant for people who were more or less of the class who had been found to be habitual criminals under the old Act, we certainly did not mean to say that the mere fact that a man had made some effort to get work or had had some period of work after his last conviction disqualified him from being sentenced to preventive detention, although it might have prevented him from being regarded as an habitual criminal under the old Act. The Act was intended to apply to people who showed by their conduct that previous sentences had had no effect on them and that for the protection of the public they were fit subjects for long detention. The main object of preventive detention is neither the reformation nor the punishment of the criminal. Its real object is the protection of the public by keeping such people in detention for a long period. If a man is sentenced at assizes for two or three offences, the court always aggregates those offences, and says to a man, either: "You will have five years on "count 1 and three years on count 2 concurrent, in which case "you will serve five years"; or, if it does not think that that is sufficient, "You will have five years on the first count and three "years on the second count consecutive, which means that you "will serve eight years." The sentence in the first case is five years and in the second eight years. Is it, therefore, to be said that in sentencing a man to five years and three years one is sentencing him on two separate occasions, whereas if he is sentenced to five years alone he is only being sentenced on one occasion? The point is that if he shows that the sentences which he receives at that court and two other courts do not deter him from committing a crime, then he is to be liable to preventive detention.

The court is therefore of opinion that we must construe these words "on at least three previous occasions," as meaning that each occasion is a separate occasion if sentences have been passed at a separate court; that is to say, that two sentences passed on the same man at the same sessions or the same assizes will not rank as passed on two separate occasions; they must be at separate assizes or quarter sessions. I think that that gives effect to the intention of the Act, because it will then have been shown that his three previous appearances in court and the sentences imposed on him on three separate occasions have not done any good, and that the time has therefore come to impose a long sentence on him.

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[4] [1949] W.N. 383; [1949] 2 All E.R. 687.

The only difference with regard to corrective training (because the same words, as I have already said, appear in the provisions on corrective training and regarding orders to the prisoner to report) is that in that case summary convictions count if they were for offences which would be punishable with imprisonment of two years or more, and I think that it would be unfortunate if we had to decide that the deputy chairman was wrong. It would be difficult for the police to know exactly how to treat summary convictions, and we therefore find no difficulty in saying that if the "previous occasions" for the purpose of the sections on corrective training and the order to report were summary convictions, the petty sessions which adjudicated on an information (where there was no remand) would do so on a separate occasion, even though a person might be convicted of three or four summary offences on the same day. Thus, if a person is dealt with for three offences in the month of April at the same court, he will only have been convicted on one occasion, whereas if he appears on separate informations twice in that same month but at courts held at an interval, he will then be convicted on two occasions. I think that that is the only sensible reading. If one construes the word "occasion" as really meaning appearance in court, appearance at the assizes, appearance at the quarter sessions or the petty sessions, that gives a meaning which is in my view consonant with the spirit and intention of the Act.

For these reasons we think that the deputy chairman of Dorset Quarter Sessions was right in holding that the prisoner was not eligible for preventive detention, and we see no reason to alter the sentence.

The only other point is this. We said in giving leave to appeal that the deputy chairman in passing sentence had not said that there would be an order under section 22. That matter has been considered in this court before now, and we found no difficulty in saying that where the court had not said that it refrained from making any order under section 22, and it was found on appeal that per incuriam an order had not been made, the sentence would be altered to that extent. In this case, as the prisoner has leave to appeal, we can do it, but in any case where the prisoner does not appeal against sentence, we have called attention to the fact that the order can be made, for the statute is mandatory that the order "shall" be made unless reasons are given for refraining from making such an order. This court will therefore make that order if the matter comes before us on an application.

We may add that where the governor of the gaol finds, when he receives the prisoner into custody or receives the return signed by the clerk of the peace, that an order has not been made in a case in which the section would operate, we see no objection at all to his applying to the clerk of assize or clerk of the peace to find out whether the order has been left out per incuriam, either because the chairman forgot to say it or the clerk of the peace forgot to record it, although it ought to have been recorded. The governor is entitled to call the court's attention to it. Of course, if the court refrained from making it, that is quite another matter; but the statute says that it "shall" be done, unless the court otherwise determines.

Appeal dismissed.

Solicitors: *Director of Public Prosecutions for both parties.*

M. M. H.

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Somervell,
Jenkins and
Hodson L.JJ.

M. & F. FRAWLEY LD. *v.* THE VE-RI-BEST CO. LD.

[1952 H. 823.]

Landlord and Tenant—Leasehold property—Expiring tenancy—New lease—Business of builder and decorator—Shop—"Retail trade or "business"—Shops Act, 1950 (14 *Geo.* 6, *c.* 28), *s.* 74 (1)—*Leasehold Property (Temporary Provisions) Act,* 1951 (14 *&* 15 *Geo.* 6, *c.* 38), *s.* 10 (1) *and* (2); *s.* 20.

The plaintiffs, a firm of builders and decorators, whose lease of premises was due to expire on December 25, 1952, applied to the county court judge for, and were granted, a new lease, under section 10 of the Leasehold Property (Temporary Provisions) Act, 1951, on the ground that the premises were a shop, occupied wholly or mainly for the purpose of a retail trade or business, within the meaning of the Act. On appeal by the defendant landlords:—

Held, that the word "shop" as defined by section 20 of the Act of 1951 and section 74 of the Shops Act, 1950, did not cover the business of builders and decorators as carried on by the plaintiffs, and that the appeal must be allowed.

Per Somervell L.J. The history of the statutes dealing with shops, which are now consolidated in the Act of 1950, supports the view that the words "retail trade or business" are not capable of the wide construction sought to be put on them by the plaintiffs. The words ought not to be construed as bringing in a business such as is carried on by the plaintiffs.

Per Jenkins L.J. Subsection (2) of section 10 of the Act of 1951 shows that the statute contemplates that the retail trade or business, by virtue of which the shop qualifies under the definition, will be carried on in the shop. If the expression "retail trade or "business" covered services rendered by a builder on the customer's own premises or on a building site, it would have been unnecessary to treat as doubtful cases requiring inclusion by definition, the business of a barber or hairdresser, the sale of refreshments, etc., for all would be covered by the phrase itself. A business might be a retail business although it was concerned with matters other than the sale of goods, but the designation "retail" seems to be wholly alien to the business of a builder and decorator.

Per Hodson L.J. The word "retail" primarily suggests the sale of goods rather than of services, and when it is sought to apply the word to the sale of services one is bound to consider whether the services are carried out on the premises, as, for example, in the case of a barber, or away from the premises as in the present case. That is a valid distinction in considering the word "retail," and it is supported by Lord Thankerton in *Toogood & Sons Ld.* v. *Green* [1932] A.C. 663, 674; 48 T.L.R. 463.

Appeal from Judge Blagden sitting at Westminster county court.

The plaintiffs, M. & F. Frawley Ld., builders and decorators, were the tenants of No. 21, Lawrence Place, New Oxford Street, W.C.1, and their lease was due to expire on December 25, 1952. They therefore, on October 8, 1952, applied to Judge Blagden for a renewal of the lease under section 10 of the Leasehold Property (Temporary Provisions) Act, 1951.[1] The judge granted the application, holding that the premises were a "shop" and that the plaintiffs were carrying on a "retail trade or business" within the meaning of section 20 of the Act of 1951 and section 74 of the Shops Act, 1950.[1]

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[1] Leasehold Property (Temporary Provisions) Act, 1951, s. 10: "(1) The provisions of this Part of "this Act shall have effect for "enabling the occupier of a shop "under a tenancy to which this sec- "tion applies (hereinafter referred to "as 'the expiring tenancy') to apply "to the court for, and subject to the "provisions of this Act to obtain, the "grant of a new tenancy where "apart from the next following "section the expiring tenancy would "come to an end immediately before "the date of the commencement of "this Act or within the period of two "years beginning with that date, "and would so come to an end by "effluxion of time or by the expira- "tion of a notice to quit given by the

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At all material times the plaintiffs had exhibited on the premises the notice "Builders' materials supplied by retail," and over the entrance door there was placed a large key and the notice "Keys cut," but it was not suggested that the sale of building materials to the public was a substantial or appreciable part of the plaintiffs' business.

The defendants now appealed, contending that the premises were not a shop and were not occupied wholly or mainly for the purposes of a retail trade or business.

I. S. Warren for the defendants. The short point is whether the premises of a builder and decorator are a "shop" within the meaning of section 20 of the Leasehold Property (Temporary Provisions) Act, 1951. It is submitted that the county court judge was wrong in holding that they are. By that section "shop" is defined as meaning "premises . . . occupied wholly "or mainly for the purposes of a retail trade or business," and "retail trade or business" is defined as having the same meaning as in the Shops Act of 1950. In section 74 of the Act of 1950 retail trade or business "includes the business of a barber or "hairdresser . . . , the business of lending books or periodicals "when carried on for purposes of gain, and retail sales by "auction." The judge rightly, it is submitted, excluded from consideration the small amount of actual retail sales of building materials proved to have taken place on the premises, because the definition in section 20 requires the premises to be wholly or mainly occupied for the purposes of a retail trade or business. A

"landlord, whether before or after "the commencement of this Act. (2) "This section applies to a tenancy "the subject of which—(*a*) consists "of a shop, or (*b*) consists of a "shop and of living accommodation "occupied wholly or mainly by the "tenant or by a person who is "employed by the tenant for the "purposes of the retail trade or business carried on in the shop. . . ."

Section 20: "(1) In this Act the "following expressions have the "meanings hereby assigned to them "respectively, that is to say:—. . . "'retail trade or business' has the "same meaning as in the Shops Act, "1950, except that it does not include "the sale of intoxicating liquor for "consumption on the premises, . . ." "'Shop' means premises occupied "wholly for business purposes, and "so occupied wholly or mainly for "the purposes of a retail trade or "business."

Shops Act, 1950, s. 74: "(1) In "this Act, save where the context "otherwise requires—. . . 'retail trade "'or business' includes the business "of a barber or hairdresser, the "sale of refreshments or intoxicating "liquors, the business of lending "books or periodicals when carried "on for purposes of gain, and retail "sales by auction, but does not "include the sale of programmes and "catalogues and other similar sales "at theatres and places of amuse-"ment."

builder is neither a retailer nor a wholesaler. He is sui generis. The county court judge adopted the wrong test. The expression "retail trade or business" means retail buying and selling to members of the public, plus the occupations which section 74 enacts that the definition shall include, and which, it is submitted, are intended to give extended and unnatural meaning to the words "retail trade or business."

[Somervell L.J. If you give to the definition the wide meaning given to it by the judge there would appear to be no necessity for the words "includes the business of a barber," etc.]

That is so. If the business of a builder and decorator is a retail trade or business, then any premises or site where his business is carried on would be a shop. The judge has applied a test which is sufficient to distinguish between retail and wholesale, and has then sought to force all business into one or other of those categories. That is wrong. The business of a builder falls outside both those categories. That view of the matter is supported by the decisions in *Ritz Cleaners Ld.* v. *West Middlesex Assessment Committee* [2] and *Toogood & Sons Ld.* v. *Green.*[3]

J. Asher for the plaintiffs. The whole of the business of the plaintiffs is in fact conducted by and from the shop, and it is immaterial whether the physical part of it is done in the shop or a hundred miles away. It is still done by and from the shop. The judge had the advantage of viewing the premises and it is to be noted that the lease recites that it is a shop. That is some indication of how the parties regarded these premises. It is suggested that the activities carried on on the premises are so limited as not to be relevant to the case, but the defendants cannot have it both ways. If the extra-mural activities are not carried on by and from the shop, then, however small are the activities admittedly carried on in the shop, they are wholly and mainly for the purpose of a retail trade or business. "Business" is apparently something comprehending two distinct factors, which lends support to the contention that the definition must be read as "retail trade or retail business." The distinction between retail trade and retail business may be that retail trading means the buying and selling of commodities to the public, and business covers possibly almost every activity for profit or gain. It may be an extension of the word trading to say that a man "trades" his services for money. The reasoning of Greer L.J. in *Ritz Cleaners Ld.* v. *West Middlesex Assessment Committee*,[4] where he says, "It seems to me that the words 'retail trade or business' "include premises in which a shop is used for the purpose of "supplying services to customers who resort to the shop direct," and "The essential fact which, in my opinion, determines this "appeal in favour of the assessment committee, lies in the statement that the respondents deal direct with members of the "public, and do not work for any other firm," can equally be applied to the present case. Customers resort to this shop direct, or are invited to go there, for the purpose of placing their orders or requests. These are therefore premises occupied wholly or mainly for the purposes of a retail trade or business.

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[2] [1937] 2 K.B. 642; 53 T.L.R. 588; [1937] 2 All E.R. 368.

[3] [1932] A.C. 663, 674.

[4] [1937] 2 K.B. 642, 663, 664.

I. N. S. S. Warren in reply.

SOMERVELL L.J. This is an appeal from a decision of Judge Blagden. The application was made by Messrs. Frawley Ld. under the Leasehold Property (Temporary Provisions) Act, 1951, section 10 of which provides that the occupier of a shop may "apply to "the court for, and subject to the provisions of this Act . . . "obtain, the grant of a new tenancy," subject to certain conditions. The plaintiffs maintain that they were within that provision. The only answer with which we are concerned is that the premises were not a shop. Before going into the facts I will read the relevant definitions. [His Lordship read the definitions of "shop" and "retail trade or business" in section 20 of the Act of 1951 and continued:] The judge had a "view," which we have not had the advantage of having, but he set out very clearly the nature of the premises and the business of the plaintiffs. They have at all material times had a notice up "Builders' materials supplied by retail." Over the door there is a key and the words "Keys cut." Entering the premises, there is a small room where there are pots of paint and packets of cement, and paint brushes. They were available for sale to the general public. There is no counter, but the goods are displayed on a table and in a cupboard under the table. Then there are doors marked "office," and the rest of the premises is not open to the public and is very much greater in area. Those non-public rooms could fairly be described as offices, though a certain amount of material is kept there and work is done in one of them in cutting keys. In the basement, bulkier materials are stored. The plaintiffs are, and are described on their notepaper, as the judge found, as builders and decorators. Apart from cutting keys, they also do plumbing and electricians' work and some sign writing. They have been there for about 17 years.

It is not suggested on the part of the plaintiffs that this business of selling building materials to the public is a substantial or appreciable part of the business done by them. That is to say, if the issue whether this was a shop or not depended on this activity, it could not be said that these premises were used wholly or mainly for that particular trading activity. The judge has decided that the plaintiffs were entitled to be granted a new lease on the ground that the premises where the business was carried on by them as builders and decorators was within the words of the definition a shop. The case, therefore, turns on the construction of those words.

The definition in the Shops Act, 1950, of "retail trade or "business" takes the form of saying that the words to be defined "include" certain matters which follow. It was suggested, in the course of the argument, that "include" is normally used when something is to be included which manifestly would be outside the words to be defined but for the definition. I do not myself accept that view, nor do I wish to lay down any general observation as to what the word "include" may mean in every context. But in this context I think that it is plain that the words which follow "includes" describe activities about which, at any rate, there might have been disputes whether they came within the words "retail trade or business." Undoubtedly, the word "retail," which governs the two words which follow, does primarily suggest the selling of goods rather than the selling of services.

In the course of the argument in the court below, and before us, a very wide construction of this phrase was put forward on these lines. It was said, rightly, that the word "business" in a certain context is a word of very wide import, possibly covering almost every activity for profit or gain. Then it was said, though I do not agree with this, that the word "retail" means any business activity in which the person carrying it on comes in contact with, and supplies services or other facilities to, members of the public as distinct from persons in trade. Then it was said that those two things ought to be, as it were, read into this tripartite expression "retail trade or business." The judge considered that argument, and he himself pointed out that that appeared to cover things which would, at any rate, seem to be a very long way away from the word with which one starts, which is "shop." The general character of the word to be defined must colour the definition. So far as I can see, this wide construction would include bankers. I need not, however, pause to consider how far it would go, because it is plain to me that if in their context the words "retail trade or business" were to be given a construction of that kind, then the definition in the Shops Act of 1950 was wholly unnecessary and would be an absurd provision.

We were referred to the history of the matter, and it has been explained how the premises of a barber came to be included as a "shop" and how the expression "retail trade or business" came to appear in the statutes which have dealt with shops and which are now consolidated in the Act of 1950. I do not find it necessary to refer in detail to those matters, but I think that the history supports the argument that these words are not capable of the wide construction which has been suggested. It seems to me that if the word "business" is to be regarded as extending the meaning beyond the buying and selling of goods, the extension (and we have examples in the definition) is of this kind. There are cases, and the barber is a very good example, where although no chattel may be sold services are sought and received at premises which are normally and naturally described as a shop. The same would apply, probably, to the business of lending books. But a builder and decorator seems to me to be in a different category altogether. His services are rendered normally outside his own premises.

The judge, at the conclusion of his judgment, gave as an example waterpipes bursting in somebody's house and someone being sent to the builder's premises in order that workmen may come to the house and repair the waterpipes. In my view, one is there in a different area to the shop, either according to the narrow definition, or according to the somewhat extended purview which is brought out by the definition in the Shops Act, 1950. It is unnecessary in this case to decide whether the word "business" in the Act of 1951 would bring in other activities than those which are brought in by the express words after the word "includes" in the Act of 1950. I am myself clear that they ought not to be construed as bringing in a business such as that carried on by the plaintiffs. I think that the judge felt the difficulties of the argument but, with respect, for the reasons which I have given, I have come to a different conclusion and I would allow the appeal.

Jenkins L.J. I agree. The plaintiffs, M. & F. Frawley Ld., applied under section 10 of the Act of 1951 for, and were granted by the county court judge, a new tenancy of the premises here in question. The contest in the case is whether, as the judge held, the premises were a "shop" within the meaning of the Act. The definition of "shop" is to be found in section 20 of the Act, "'shop' means premises occupied wholly for business "purposes, and so occupied wholly or mainly for the purposes "of a retail trade or business." It is provided by the same section that "'retail trade or business' has the same meaning "as in the Shops Act, 1950," which, by section 74, defines "retail trade or business" in these terms: "'retail trade or "'business' includes the business of a barber or hairdresser, the "sale of refreshments or intoxicating liquors, the business of "lending books or periodicals when carried on for purposes of "gain, and retail sales by auction, but does not include the sale "of programmes and catalogues and other similar sales at "theatres and places of amusement."

It is, perhaps, worth noting that in subsection (2) of section 10 of the Act of 1951 there is this provision: "This section applies "to a tenancy the subject of which—(*a*) consists of a shop, or "(*b*) consists of a shop and of living accommodation occupied "wholly or mainly by the tenant or by a person who is employed "by the tenant for the purposes of the retail trade or business "carried on in the shop." That provision, I think, is perhaps indirectly relevant as showing that the Act contemplates that the retail trade or business, by virtue of which the shop qualifies as such under the definition, will be carried on in the shop. My Lord has already referred to the facts found by the judge, which come very shortly to this: the plaintiff's business is that of builders and decorators. In the premises in question there is an outer room where pots of paint or size, or packets of cement, paint brushes, and the like, are available for sale to the general public. They also advertise themselves as key cutters and locksmiths. So far as the sale to the public of pots of paint, and so forth, is concerned, the judge found—and this was clearly in accordance with the evidence—that that part of the plaintiffs' activities formed an insignificant proportion of the business carried on on the premises, and that the main part of the business consisted in conducting from those premises the business of builders and decorators, receiving orders for building work, and giving estimates for building work, or tendering to undertake building work, to be carried on on the site, wherever it might be, where such work was required.

Accordingly, in view of the insignificant character of the trade done in the way of the sale of paint, and so forth, the issue in this appeal resolves itself into the very short question whether, on the true construction of the Act of 1951, the carrying on in the way I have indicated of a builders' and decorators' business, which consists of doing building and decorating work on sites or in houses wherever the services of the plaintiffs are required, is the carrying on of a "retail trade or business" within the meaning of the definition. The expression "retail trade," I think, clearly connotes in its primary sense a business consisting of selling goods to members of the public (as distinct from members of the trade) who resort to the shop or premises where the business is carried on, for the purpose of making purchases. The expression "business" may, I think, have a wider connotation than the expression "trade," the latter expression being more closely linked with transactions of purchase and sale than the expression "business." The point is a very short one, and in my view the judge erred in holding that the builders and decorators' business here in question was a retail business because it involved doing work for the actual customer on the actual customer's property as distinct, I suppose, from doing work for some middle man other than the individual who actually required the services for himself. So to hold, in my view, involves placing a wider meaning on the expression "retail trade "or business" than it will reasonably bear.

I think that conclusion is borne out by the definition in section 74 of the Shops Act, 1950, for if the expression "retail "trade or business" had the wide significance sought to be placed upon it by the plaintiffs in this case, it would not have been necessary to treat as doubtful cases, requiring inclusion by definition, the business of a barber or hairdresser, the sale of refreshments, the business of lending books, and the business of retail sales by auction; for all these would be included in the phrase itself without any express extension of the definition. The terms of the definition do no doubt suggest, and for my part I would not deny, that a business may be a retail business although it is concerned with matters other than the sale of goods; but while I have no intention of attempting to lay down any general or exhaustive definition, it does seem to me that the adjective "retail," which is primarily applicable to the sale of goods in the way I have mentioned, demands in its application, as it were by analogy, to businesses which consist in the sale of services rather than goods, that the services rendered should be performed in circumstances comparable to those in which the ordinary retail trade, in the sale of goods, is normally carried on in a retail shop. For example, the business carried on in a shop where services, such as repairing shoes, or cleaning clothes or mending watches, are rendered for customers resorting to the premises in circumstances comparable to those in which the business of selling goods by retail to similar customers might be carried on, could, I think, reasonably be held to answer the description of a "retail business."

But the designation "retail" seems to me to be wholly alien to the builders and decorators' business here in question. We have been referred to a number of authorities on other Acts, but I do not find it necessary to take up time by reading them. There is nothing in any of them, so far as I am aware, in any way inconsistent with the conclusion at which I have arrived on the construction of the language of this particular Act and its application to the judge's findings of fact. Accordingly, I agree that the appeal should be allowed.

Hodson L.J. I agree. The word "retail" does primarily suggest the sale of goods rather than services, and when one seeks to apply the word "retail" to the sale of services one is, I think, bound to consider whether the services are carried out on the premises as, for example, in the case of a barber, or away from the premises as is the present case. The judge seems to have thought that that was a distinction without a difference. At the conclusion of his judgment, when discussing a case cited to him, *Ritz Cleaners Ld.* v. *West Middlesex Assessment Committee*,[1] a case on another Act, he noted that counsel had sought to distinguish that case on the ground that there business was carried on wholly at the dealer's premises and in this case it was carried on mainly at the customer's premises. That distinction in considering the word "retail," is supported by Lord Thankerton in *Toogood & Sons Ld.* v. *Green*,[2] where he quoted a speech by Lord Dunedin in a previous case, *Turpin* v. *Middlesbrough Assessment Committee*.[3] That was a case under the particular derating Act which was there in question with regard to a retail shop. Speaking of the garage premises, Lord Dunedin said: "Now, if we compare the hereditament "here in question with a retail shop, do we find any common "characteristics? My Lords, I think we do; for they are both "buildings to which the public can resort for the purpose of

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[1] [1937] 2 K.B. 642; 53 T.L.R. 588; [1937] 2 All E.R. 368.

[2] [1932] A.C. 663, 674.

[3] [1931] A.C. 446, 474; 47 T.L.R. 308.

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1952

M. & F. Frawley Ld. v. The Ve-Ri-Best Co. Ld.

"having particular wants supplied and services rendered therein." I think that supports the distinction which counsel has sought to draw and which is, I think, a valid distinction. For these reasons, and the reasons which my Lords have given, I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Warren & Warren; Crawley & de Reya.*

A. W. G.

C. A.

1953
Jan. 20, 21.

Somervell, Birkett and Romer L.JJ.

REES *v.* BERNARD HASTIE & CO. LD.

[1952 R. No. 83.]

Factory—Protection of eyes—Provision of goggles or effective screens —"Electrical process"—Power to make regulations for processes involving special risk of injury to eye—Regulations as to specified processes—Validity—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 49—*Protection of Eyes Regulations,* 1938 (*S.R. & O.,* 1938, *No.* 654), *Sch.*

Section 49 of the Factories Act, 1937, provides: "In the case "of any such process as may be specified by regulations of the "Secretary of State, being a process which involves a special risk "of injury to the eyes from particles or fragments thrown off in the "course of the process, suitable goggles or effective screens shall, in "accordance with any directions given by the regulations, be pro- "vided to protect the eyes of the persons employed in the process." By the Protection of Eyes Regulations, 1938, made by the Secretary of State, "welding or cutting of metals by means of an electrical, "oxy-acetylene or similar process" is specified as a process to which section 49 applies.

The plaintiff, a cutter in the employment of the defendants, was using an instrument which cut sheets of steel by means of shears which were operated by electrical power. He was holding the machine in his hand, and was bending over the metal to be cut, when a strip of steel which had been cut off the sheet sprang up and pierced an eye, causing him to lose the sight of that eye. He claimed and was awarded damages on the ground that the defendant employers had been guilty of a breach of statutory duty in failing to provide goggles or an effective screen. On appeal by the defendants:—

Held, that the regulation applied only to high temperature electrical processes, which involved special risk to the eyes from fragments or particles of metal which were thrown off, and not to the cold process on which the plaintiff was engaged, which did not involve any special risk.

Quaere whether once the Secretary of State under section 49 has specified by regulation a process as being a process which involves a special risk of injury to the eyes from particles or fragments thrown off in the course of the process, it is not open to a defendant to take the point that the process so specified is not one which involves such special risk.

Decision of Croom-Johnson J. reversed.

APPEAL from Croom-Johnson J.

The plaintiff, Rees, a cutter employed by the defendants, Bernard Hastie & Co. Ld., a firm of metal workers, was engaged in cutting and trimming a sheet of steel by means of an instrument fitted with shears, which were operated by electrical power, obtained by a flex attached to a plug. Having the instrument in his hand he bent forward, apparently to examine his work, and a strip of steel sprang up and so injured an eye that he lost the sight of it. No goggles or effective screens for the protection of the eyes had been provided by the defendants, and the plaintiff claimed damages, alleging that the defendants were in breach of statutory duty under section 49 of the Factories Act, 1937, and the regulations made thereunder.[1] Croom-Johnson J., sitting at Swansea Assizes, on July 18, 1952, gave judgment for the plaintiff, awarding him £1,038 8s. 9d. damages. The defendants appealed.

F. W. Beney Q.C. and *G. P. Thomas* for defendants. The only question for the court is whether the judge was right in law in holding that the defendants were guilty of a breach of statutory duty under section 49 of the Factories Act, and the regulations made thereupon, in failing to provide the workman with goggles or an effective screen. The statute and the regulations provide for the protection of the eyes against particles or fragments of metal thrown off by electrical, oxy-acetylene or similar process. Welding or cutting by such processes involves the use of intense heat. The process in which the plaintiff was employed was cold cutting and did not involve any such special risk from particles or fragments being thrown off. Moreover this was not an electrical process but a cutting by shears or knives by electrical power.

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[1] Factories Act, 1937, s. 49: "Protection of eyes in certain processes.—In the case of any such "process as may be specified by "regulations of the Secretary of State, "being a process which involves a "special risk of injury to the eyes "from particles or fragments thrown "off in the course of the process, "suitable goggles or effective screens "shall, in accordance with any directions given by the regulations, be "provided to protect the eyes of the "persons employed in the process."

Protection of Eyes Regulations, 1938, reg. 1: "In pursuance of s. 49 "of the Factories Act, 1937, I hereby "specify the processes in the schedule "to these regulations as processes in "the case of which the said section "shall apply."

Sch.: "Welding or cutting of "metals by means of an electrical, "oxy-acetylene or similar process."

R. M. H. Everett Q.C. and *T. Watkins* for plaintiff. The decision of the judge should be upheld. The plaintiff was engaged in an electrical process and the strip of steel which caused injury to his eye was clearly a fragment of metal thrown off in that process. Section 49 is essentially protective and the Secretary of State is authorized by Parliament to determine by regulation, acting on expert advice, in what processes protection is to be provided. The regulation covered the present case and the trial judge had held that it was not open to anyone to challenge the regulation on the ground that the process did not involve a special risk of injury to the eyes.

Beney Q.C. in reply.

SOMERVELL L.J., having stated the facts and read section 49 of the Act of 1937, continued:—Regulations were made in pursuance of that section, and in the schedule various processes are set out in respect of which goggles or screens are to be provided. We are concerned with the construction of the words in the schedule " welding or cutting of metals by means of an electrical, " oxy-acetylene or similar process." The instrument which the plaintiff was using was before the court, and I will endeavour to describe it briefly. It cuts the steel by means of knives, or shears as they are called by one of the witnesses, which were operated by electrical power. The machine, which was held in the hand, had a flex attached to a plug from which the electrical power came, and it had a motor inside it which operated the shears. The cutting was done in the cold and the process as described was as follows: The plaintiff, or presumably anyone else using these shears, first of all cut round the shape which was ultimately to be cut out of the sheet, leaving a certain margin. He made a rough cutting in the first place which resulted in a piece of steel which was, of course, larger than the actual piece which was finally to emerge. He would then cut round, carefully cutting off the strip which had been left, so as to get the precise shape which was required. It was in the course of cutting off that strip that, as described by him, the strip sprang up. It is not quite clear whether he thought that it sprang up before it had been completely severed or not, but it had a very sharp point, his head was fairly near the work he was doing, and the injury to the eye took place in that way.

The first issue raised is whether what he was doing was a process within the words of the regulation that I have read. Mr. Beney submits that it was not. Mr. Marven Everett, on behalf of the plaintiff, submits that it was. The plaintiff's construction, I think, may be summarized in this way—that the regulation covers any form of cutting if the power which enables the steel to be cut is electrical. Mr. Beney submits that that is wrong. He submits, in effect (and I will analyse it later with a little more elaboration) that the regulation only covers cutting where the electrical process is one which involves a very high temperature. One can, I think, approach the matter by first considering the oxy-acetylene process. That, it is clear, and it is not disputed, welds and cuts by raising the portion of the steel to which the blowpipe is applied to a very high temperature. In welding, of course, the two separate pieces of steel are welded together by the high temperature, and in cutting the high temperature is applied by a method the details of which do not matter, and the two pieces come apart. It is clear from the evidence that though, in one sense, that is not cutting in the sense in which the word is ordinarily used, such as cutting with a knife, or something like a knife, or scissors or shears, that process is described in the trade as cutting, and, of course, it is quite clearly described as cutting in this regulation, which plainly covers cutting by means of an oxy-acetylene process. On the evidence, when so welded or cut particles and fragments are thrown off at a high temperature, which constitute a special risk of injury to the eyes. There was no dispute about that.

Turning from that to the electrical process, the only electrical process which can weld is, of course, a process by which a very high temperature is obtained, and it is obtained by an arc. There is the same throwing off of particles as with oxy-acetylene. But that process can be used, as can the oxy-acetylene process, for cutting.

What is submitted on behalf of the defendants is that the electrical process to which the regulation applies is a high temperature process, the use of an arc. I have come to the conclusion that that is the natural construction of this regulation and I can state my reasons, I hope, briefly. I think that the fact that the regulation covers welding or cutting indicates that a process to which it applies, whether oxy-acetylene or electrical, is one which can be used for either purpose. Then I think that the word "similar" indicates a similarity in the danger to the eyes with which the regulation is concerned. As in the case of oxy-acetylene, it is plainly concerned with the danger which is well known of fragments and particles being thrown off at a high temperature, I would expect it to be concerned with the same danger in that part of it which refers to an electrical process. If it is read as including all processes of cutting when electrical power is used, it is obvious that the dangers, if they existed, would be of a different character. I think that the fact that we are construing a single sentence and the use of the word "similar" points to the construction for which Mr. Beney contends, namely, that the electrical processes are high temperature processes, and presumably the words "similar process" were inserted to cover chemical means, if they exist or might exist, of obtaining a very high temperature other than by the combination of oxygen and acetylene. That, as I have said, is, to my mind, the natural construction.

Even if the other construction were possible, this is a statute which creates offences, and the natural construction should clearly prevail for the benefit of the person against whom a breach is alleged. The judge, as I read his judgment, seems to have assumed, or readily come to the conclusion, that the wider construction contended for by the plaintiff was right. I have given my reasons for coming in that respect to a different conclusion. He went on to consider whether it was open to him to accept on the evidence, and act on a submission, that in fact in this process particles and fragments were not thrown off or, at any rate, not thrown off so as to involve a special risk of injury to the eye and, therefore, the regulation, in so far as it covered this process, should be regarded as ultra vires. He took the view that that was not a matter which it was open to him to consider, and that the Secretary of State was the sole judge, and as he specified the process in regulations made under section 49 it was not open to anyone to challenge that process on the basis that it was not a process which involved a special risk of injury to the eyes within the meaning of the section. Speaking for myself, I would have thought that at first sight such a contention would be open to a party should a regulation be made (and there is no reason to anticipate that it will) covering a process which did not involve any special risk as is referred to. I think I can see a possible argument to the contrary sense, and, speaking for myself, as it does not arise in this appeal, I think it had better be left over to be decided when it arises. I am not satisfied that the conclusion to which the judge came was necessarily the right one. For these reasons I would allow the appeal.

BIRKETT L.J. I am of the same opinion, and as we are differing from the judge I will just add a sentence or two to state my own opinion about the matter. There is no doubt that the Secretary of State in this case has specified in the regulations of 1938 a process which involves a special risk of injury to the eyes, in these words: "Welding or cutting of metals by means of an electrical, oxy-"acetylene or similar process." I think that the question in this case is not as to the extent of the powers of the Secretary of State or whether he ought to have done this or ought to have done the other. I think that the simple question for this court is whether the instrument which does the work of cutting, as it has been described in the judgment of my Lord, comes within the definition or, in other and more simple words, is this an "electrical "process"? My Lord has also given his view of that particular regulation. He said, and I agree, that there must be a process for the purposes of "welding or cutting of metals by "means of an electrical, oxy-acetylene or similar process."

It is to be observed that in the judgment of the trial judge he said this: "What has he"—that is, the Secretary of State—"done? Welding, of course, is an entirely different process. "Nowadays, when we all have a nodding acquaintance with all "sorts of processes, and all the rest of it, I suppose I am "permitted to say, welding seems to me to be something quite "different. It involves heat, and it involves something quite "different from a mere cutting by electricity. That is all this is." Quite apart from the question whether this was, in fact, a cutting by electricity, I share the view that my Lord has expressed with regard to the construction of this particular regulation. I think that the judge's construction was wrong and that this appeal ought to be allowed.

ROMER L.J. I agree. It seems to me that the relevant regulation is confined to cutting processes which involve the application of heat. There is nothing I can usefully add to the very clear exposition on that subject which has fallen from my Lord.

The only point on which I might add a word is on the question whether a regulation is to be conclusively treated as valid because it is made by the Secretary of State regardless of any other aspect of the matter. The judge said in his judgment, "It "looks to me as if once the regulations have been specified by "the Secretary of State, that particular process is brought within "the section and, being brought within the section, it follows "that suitable goggles or effective screens ought to be provided "to protect the eyes of a person employed in the process. It "does not seem to me to matter that the process is like dyeing, "or anything of that sort: the process is the work which the man "is being employed to do, and when he is employed to do that "the Secretary of State is made the legislative authority under "the section. It is for him to legislate. Parliament has put "him into the position of deciding whether a particular process "ought to be brought within the section or not. I do not think "the court has any duty or power to examine and see whether "the Secretary of State is right or wrong in making the regulation."

I am not quite sure whether the judge was there laying down that the mere fact that the Minister makes a regulation under section 49 establishes in itself the validity of the regulation. On the view that we have taken with regard to the meaning of the regulation, in effect this particular point does not fall for decision, but for my part I should hesitate to adopt that view, as at present advised, because although I appreciate the suggestion which was made to the effect that the words in section 49 "being a process "which involves a special risk of injury" are nothing more than a directive, as it were, to the Minister, nevertheless, I think a formidable argument could be presented to the effect that the words "being a process which involves a special risk of injury to "the eyes" raise a question of fact which is open to review at the instance of anyone who is being proceeded against for an alleged breach of a regulation made under that section. It may be that, as there are no such words as "being in the opinion of the Secretary "of State a process," and so on, it would be open to an employer to prove, if he could, that the process which is the subject of the regulation was not, in fact, one which involved a special risk of injury. As, however, the point does not fall for decision in the present case, I agree with my Lord that it should be left as an open question. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Helder, Roberts & Co., for Roger Williams & Son, Swansea; Chamberlain & Co., for Beor, Wilson & Lloyd, Swansea.*

A. W. G.

PERRY *v.* GARNER.

1953
Jan. 19, 20.

Lord Goddard C.J., Croom-Johnson and Pearson JJ.

Public Health—Pests—Prevention of damage by—Rats—Notice specifying steps to be taken—" Poison treatment . . . or other work of a not less effectual character"—Notice unspecific—Prevention of Damage by Pests Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 55), *s.* 4 (1).

The occupier of a field was served by the local authority with a notice under section 4 (1) of the Prevention of Damage by Pests Act, 1949, requiring him within 14 days to take the following steps for the destruction of rats on his land: " . . . poison treatment " of the infested land . . . or other work of a not less effectual " character . . ." :—

Held, that by the inclusion in the notice of both specific and, alternatively, unspecific steps to be taken, the whole notice became unspecific and, therefore, was bad.

Case stated by Buckinghamshire justices.

On July 21, 1952, at a court of summary jurisdiction sitting at Princes Risborough, an information was preferred by John Percival Perry, on behalf of the Wycombe Urban District Council, under the Prevention of Damage by Pests Act, 1949, against Charles Aubrey Garner, charging him with unlawfully failing to take such steps as were specified in a notice served on him by the council under section 4 [1] of the Act, for the destruction of rats on his land.

The prosecutor was the council's chief sanitary inspector. The defendant was the occupier of a field situated at Horsenden, Buckinghamshire. During the months of December, 1951, and January, 1952, representatives of the council visited the defendant's land which showed evidence of severe infestation by rats. The defendant was informed of his duties under the Act of 1949, and during January, 1952, he removed from the field a straw rick and set fire to another rick which, due to the intervention of the fire brigade, was only partially burnt. On February 4, 1952, a notice under section 4 of the Act of 1949 was served by the prosecutor on the defendant requiring him within a period of 14 days ending on February 20, 1952, to take the following steps for destruction of rats on the land and for keeping the land free from rats, that was to say, poison treatment of infested land, such measures to be carried out to the approval of the local authority, or other work of a not less effectual character, to be executed for the destruction of the rats. The defendant did not appeal against the notice under section 290 (3) of the Public Health Act, 1936, as applied by section 4 (5) of the Act of 1949, nor did he during the period of the notice adopt any measure of poison treatment or carry out any other work for the destruction of the rats, being of the opinion that the measures which he had already taken had proved effective. During February and March the field was visited by the prosecutor and the council's rodent operative, when 63 rat holes, which appeared to be recent, were stopped up. On March 24, 1952, the prosecutor visited the field and found that the infestation of rats had ceased.

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[1] Prevention of Damage by Pests Act, 1949, s. 4 (1): "If in the case " of any land it appears to the local " authority, whether in consequence " of a notice given in respect of the " land under the last foregoing section " or otherwise, that steps should be " taken for the destruction of rats or " mice on the land or otherwise for " keeping the land free from rats and " mice, they may serve on the owner " or occupier of the land a notice " requiring him to take, within such " reasonable period as may be speci" fied in the notice, such reasonable " steps for the purpose aforesaid as " may be so specified."

Subs. (5): " Subsections (3) to (5) " of section 290 of the Public Health " Act, 1936 (which provide for an " appeal to a court of summary juris" diction against certain notices re" quiring the execution of works under " that Act) shall apply to any notice " served under this section requiring " the carrying out of any structural " works as they apply to any such " notice as is mentioned in subsection " (1) of that section."

For the prosecutor it was contended that the defendant had failed to take any of the steps required by the notice and, therefore an offence had been committed. For the defendant it was contended that it was dangerous to use poison and that he had taken other steps of a not less effectual character than poison prior to the notice.

The justices, being of the opinion that the prosecution had failed to discharge the onus of proof, dismissed the information.

The prosecutor appealed.

J. P. Widgery for the prosecutor. The primary requirement of the notice was that poison treatment should be adopted, but an alternative was put in, so that the defendant could, if he wished, adopt some other method of a not less effectual character. Provided the second alternative did not embarrass the defendant the notice was good.

The defendant did not appear and was not represented.

LORD GODDARD C.J. This is a case stated by justices for the County of Buckingham, before whom the defendant was summoned for failing to take steps to destroy rats and to keep land

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Lord Goddard C.J.

free from rats pursuant to a notice served under the Prevention of Damage by Pests Act, 1949.

The facts show that the local authority was satisfied that for some time these premises had been infested with rats. They served a notice on the defendant requiring him to take certain steps. He did something, but the local authority thought that it was not enough. He did not appeal against the notice, and he was subsequently prosecuted for not having abated the nuisance. Meanwhile, the local authority went on to the defendant's land and took steps themselves which they are satisfied have apparently reduced or stopped any further infestation by rats. The defendant was prosecuted under the provisions of the Act of 1949, because it was said that he disregarded the notice that was served upon him. Section 5 of that Act provides that if a person fails to take steps which the local authority can require him to take under section 4 he shall be "liable on summary conviction to a "fine not exceeding in the case of a first offence £50, and in the "case of a second or any subsequent offence £100"; so it is a serious matter.

The point which the court has taken in this matter, and which does not appear to have been argued below, is one which arises on the face of the case. The justices, having stated the facts proved before them, said: "We, being of opinion that the prosecution had failed to discharge the onus of proof, dismissed the "said information," and they ask us whether they came to a correct decision.

Section 4 (5) of the Act of 1949 applies to structural works only and not to such a notice as the present. Therefore, the owner must comply with the notice or else he commits an offence, and he has no means of appealing against the notice. The present notice required the defendant ". . . to take the "following steps for the destruction of rats on the said land "and for keeping the said land free from rats, that is to say, "poison treatment of infested land, such measures to be carried "out to the approval of the local authority, or other work, of a "not less effectual character, to be executed for the destruction "of the rats."

In the opinion of this court, that is not specifying the steps which are to be taken. The notice specifies a step which the defendant may take, namely, poison treatment, but it tells him that he may take other steps which are not specified. The notice at once becomes unspecific because it directs the doing of a

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particular thing or something else, and the something else is left completely at large. I do not think, therefore, that it can be said that this notice complies with the section. If it had confined itself to poison treatment, there would have been a compliance, but as it does not, in my opinion this is not a good notice under the Act. Accordingly, I think that the prosecution fails in limine, that the justices were right in not convicting, and that this appeal fails.

CROOM-JOHNSON J. I agree, for the same reasons.

PEARSON J. I agree.

Appeal dismissed.

Solicitors: *Preston, Lane-Claypon & O'Kelly, for Reynolds, Parry-Jones & Crawford, High Wycombe.*

J. D. P.

1952
Dec. 2, 3, 4, 16.

Sellers J.

J. H. PIGOTT & SON *v.* DOCKS AND INLAND WATERWAYS EXECUTIVE.

[1952, P. No. 1864.]

Shipping—Dock—Statutory authority—Tug and towage—Shipping and unshipping of goods—Exclusion of privately owned tugs—Humber Commercial Railway and Dock Act, 1901 (1 *Edw.* 7, *c. ccii*), *ss.* 66, 70—*Harbours, Docks, and Piers Clauses Act,* 1847 (10 *&* 11 *Vict. c.* 27), *s.* 33.

The defendants, a statutory dock authority, administered a dock under special Acts as modified and amended by other and general Acts, the special Acts incorporating the Harbours, Docks and Piers Clauses Act, 1847, except so far as expressly varied by or inconsistent with them. From 1951, the plaintiffs as tug owners had provided services for towing in and out of the dock vessels engaged in shipping and unshipping goods at the dock. In March, 1952, the defendants sought to exclude the plaintiffs' tugs from competing with their own tugs save on their own terms. They claimed the right to do so as owners of the dock and by virtue of the provisions of sections 66 and 70 of the special Act, the Humber Commercial Railway and Dock Act, 1901.

Held, that by virtue of section 33 of the Act of 1847 all persons and vehicles, including tugs, were entitled, on payment of the appropriate dues, to freedom of access to the dock for the shipping and unshipping of goods. Nothing in the special Acts made it compulsory for ships to use the defendants' tugs, or expressly or by implication entitled the defendants to exclude the tugs of others. Accordingly, the plaintiffs were entitled in the ordinary course of their business to employ their tugs in providing towage services to vessels entering or leaving the dock for the shipping or unshipping of goods and embarking or landing of passengers.

Dicta in *British Trawlers Federation Ld.* v. *London and North-Eastern Railway Co.* [1933] 2 K.B. 14; 49 T.L.R. 327, and in *London and North-Eastern Railway Co.* v. *British Trawlers Federation Ld.* [1934] A.C. 279; 50 T.L.R. 275 applied.

Great Central Railway Co. v. *North-Eastern Steam Fishing Co.* (1906) 22 T.L.R. 520 distinguished.

ACTION.

The facts, as stated by Sellers J., were as follows:—

The plaintiffs, J. H. Pigott & Son, carried on a family business as steam tug owners, which had provided tug services at Union Dock, Grimsby, since 1886. During 1951 and 1952, they extended their services to the Immingham Docks in the County of Lincoln. The defendants, the Docks and Inland Waterways Executive, administered Immingham Docks, under delegation from the British Transport Commission, under and subject to statutory powers and restrictions derived as follows: The Humber Commercial Railway and Dock Act, 1901, authorized the construction of a dock adjoining the existing docks at Grimsby. The Humber Commercial Railway and Dock Act, 1904, empowered the Humber Commercial Railway and Dock Company to construct a new dock and abandon that which had been authorized under the Act of 1901. Both the Acts by section 2 respectively incorporated the Harbours, Docks and Piers Clauses Act, 1847 [1] (except so far as expressly varied by or inconsistent with the Acts), and by section 17 of the Act of 1904 various sections, including sections 66 and 70 [2] of the Act

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[1] Harbours, Docks and Piers Clauses Act, 1847, s. 33: "Upon payment of "the rates made payable by this and "the special Act, and subject to the "other provisions thereof, the harbour, dock, and pier shall be open "to all persons for the shipping and "unshipping of goods and the embarking and landing of passengers."

[2] Humber Commercial Railway and Dock Act, 1901, s. 66: "With regard "to the management use and regulation of the dock works of the company and the regulation and control "of vessels resorting thereto the company may have and exercise the "following powers:—

"(1) Subject to the right of the

of 1901, were made to apply to the dock, railway and other works authorized by the Act of 1904 as if they had been re-enacted in

"owner or master of any vessel to "employ his crew in the performance "of any of the services hereinafter "mentioned the company may if and "when they think fit employ and "license any tugs boatmen riggers "hobblers and other proper persons "for the purpose of effectually and "speedily working any vessel within "the limits of the dock-master's "authority or within or into or out "of the dock or for removing any "such vessel from time to time from "any place in the dock to any other "place in the dock in such manner as "they may consider will best effect "the purposes aforesaid and the "master or owner of any such vessel "shall pay to the company or such "licensed persons such reasonable "sum in respect to any such service "as the company may authorize or "demand:

"(2) For the better navigation of "vessels in the dock and within the "limits of the dock-master's authority "and for the use and accommodation "of vessels frequenting the dock the "company may from time to time "license such number of boatmen "riggers hobblers and other proper "persons for such periods yearly or "otherwise and on such terms and "conditions as they may think fit and "may charge such sum for every such "licence at a rate not exceeding five "shillings per annum as they may "think fit Provided always that the "company may at any time revoke "any such licence Provided also that "nothing in this Act shall entitle "such boatmen riggers hobblers and "other persons to act as pilots or to "supersede or take the place of any "licensed pilot Provided also that "nothing in this Act shall interfere "with any existing rights of pilots or "pilotage:

"(3) Whenever any delay which in "the opinion of the dock-master is "unnecessary or excessive shall take "place in the working or removing "any vessel within the limits of the "dock-master's authority or in the "discharging or loading and trimming "or in any service necessary to be "performed in connexion with any "vessel or cargo of such vessel either "from the inadequacy or improper "conduct of the persons employed or "from the negligence or default of "the master or person in charge of "such vessel the company may employ a sufficient number of suitable "persons to work or remove or to "discharge or load or perform any "service in connexion with any vessel "or the cargo of such vessel or to "assist in working or removing discharging or loading or trimming the "same and the master or owner of "such vessel shall on demand pay to "the company such reasonable sum "for any or every of such services as "the company may demand and the "master or person in charge of such "vessel who shall not properly clear "the deck of his vessel by stowing "away all such articles as may impede the delivery or loading of the "cargo thereof upon being required "so to do by the dock-master shall "for every such offence be liable to a "penalty not exceeding five pounds:

"(4) The company may by agreement with the owner consignor or "consignee of any coal coke culm "steel iron ore or other ore timber "goods wares and merchandise to "be shipped into or unshipped from "any vessel in the dock or with "the owner or master of any vessel "disembark discharge and land weigh "ship put on board and trim such "coal coke culm steel iron ore or "other ore timber goods wares and "merchandise and may recover and "receive for all or any of such services and for any other work labour "or service performed by the company "in respect of such coal coke culm "steel iron ore or other ore timber "goods wares or merchandise and "for the use of any shipping loading "trimming or discharging appliances "works or conveniences such reasonable rates as may be agreed upon "between the company and such that Act. Provision was made for the abandonment of the original works, and section 53 of the Act of 1904 and the third schedule to that Act authorized a lease for 999 years of the new dock and works to the Great Central Railway Company. By the Railways Act, 1921, and S.R. & O. 826 of 1923, the London & North-Eastern Railway acquired the rights of both the lessors and the lessees and became owners of the whole undertaking. By the Transport Act, 1947, the dock became vested in the Transport Commission, and by an executive order came under the control of the defendants in 1948.

The defendants owned two tugs which, until 1951, performed most of the towage services required at Immingham Docks, and the tugs of the plaintiffs and others from Hull made only occasional visits. But during 1951/52 the export of coal from Grimsby, mainly coastwise, greatly increased, the British Electricity Authority in particular loading regular cargoes of coal from the port. In response to direct requests, and because there was an obvious need for tugs, the plaintiffs acquired two small-sized tugs suitable for the type of vessels frequenting Immingham Docks. Their tugs were available, frequently patrolling the river off Immingham Docks awaiting engagement, and were much employed. Although the traffic of the docks had greatly increased, the defendants' own tugs were often idle during 1951/52, having lost the trade to their competitors the plaintiffs, who were apparently supplying a more attractive service.

In March, 1952, the defendants threatened generally to

"owner consignor consignee or master "respectively as though the same "were tonnage rates payable under "this Act."

S. 70: "The company for the pur-"poses of and in connexion with the "dock may build purchase contract "for or hire or license and may main-"tain and use steamers tugs lighters "and other ships and boats and may "fix such rates or charges as may "appear to them reasonable for or in "respect of the use thereof and such "rates or charges shall be paid by "the owner agent master consignee "or other person having charge of "any vessel obtaining or demanding "the assistance or use of any such "steamers tugs or lighters or other "ships or boats to the company or the "person with whom they may con-"tract (as the case may be) and such "rates and charges shall be due and "payable whether such steamers tugs "lighters or other ships or boats shall "be actually employed or not Pro-"vided the assistance or use thereof "shall have been required and shall in "consequence of such requisition have "been tendered by the master or other "person having the command of such "steamer tug lighter or other ship or "boat Provided always that nothing "in this Act contained shall be deemed "or construed to authorize the com-"pany to require any owner agent "master consignee or other person "having charge of any vessel lighter "or river craft to employ hire or use "any such steamer tug lighter or "other ship or boat."

exclude tugs (which were in substance the plaintiffs' tugs only) from providing tug services for vessels entering and leaving Immingham Docks and to restrict and reserve the necessary towage services to their own tugs or tugs hired by them under a formal hiring agreement. They submitted a draft of such an agreement to the plaintiffs, and in form stated that they were prepared to enter into agreement with the plaintiffs for the hire of their tugs. The defendants' documents disclosed, however, that they had little intention of calling on the services of the plaintiffs' tugs under any agreement entered into, preferring to hire tugs from a firm in the somewhat more remote port of Hull.

The plaintiffs thereupon instituted proceedings for a declaration that on payment of the rates made payable under the Humber Commercial Railway and Dock Act, 1901, and any statutory amendment or modification thereof, they were entitled in the ordinary course of their business to employ their tugs in providing towage services to vessels entering or leaving Immingham Docks for the shipping and unshipping of goods and/or the embarking or landing of passengers.

By their defence the defendants admitted that the object of excluding the plaintiffs' tugs was to prevent competition so that full employment might be provided for their own tugs. They further admitted that there was a greater demand for towage services than they could supply with their own tugs, but stated that they proposed to meet that by an arrangement for hiring additional tugs as and when required from Hull. They relied on the powers conferred on them by statute and on their powers as owners of the dock.

Sir Robert Aske Q.C. and *G. G. Honeyman* for the plaintiffs. It is submitted that under section 33 of the Harbours, Docks and Piers Clauses Act, 1847, rights are acquired by persons as members of the public. Once a tug has been retained for towing by a vessel, it immediately, as a member of the public, acquires a right to go into the dock on dock business, and nothing in section 33 enables the dock authority to exclude tugs other than its own or those licensed by it: see Walton J. in *Great Central Railway Co.* v. *North-Eastern Steam Fishing Co.*,[3] who said that though a company under its special Act was given power to provide tugs, that did not include a right to exclude other tugs.

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[3] (1906) 22 T.L.R. 520, 521 (reprinted in full as Note at p. 355, post).

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[Sellers J. It must be a question of degree. The tugs are only entitled to go in because their business falls within the words "shipping and unshipping of goods."]

Yes. *British Trawlers Federation Ld.* v. *London and North-Eastern Railway Co.*,[4] which later went to the House of Lords,[5] is really decisive in the present case on section 33, *per* Scrutton L.J.,[6] Lawrence L.J.[7] and Greer L.J.[8] It is crystal clear that anything commercially necessary for getting the goods to or from the quay is implied by section 33, and the use of tugs is one of the necessary ancillaries to enable the business of the port to be carried on.

[Sellers J. I should have thought so. It would be odd if a dock authority could exclude, for example, a surveyor or underwriter who, though not actually shipping or unshipping, is engaged on a ship's business.]

The defendants claim that sections 66 and 70 of the special Act—the Humber Commercial Railway and Docks Act, 1901—entitle them to say that only tugs licensed by them may tow vessels in or out. But nothing in those sections, nor in the Transport Act, 1947, which delegated to them the powers of the original company, gives them the right to exclude tugs. On the special Acts it is submitted as matters of law that:—

(1) It is a well-recognized principle that, where a statute expressly confers on a company powers which the company as property owners could exercise without statutory authority, the powers expressly given must be treated as implying a prohibition against the exercise of the wider rights which the company might have as property owners: *per* Lindley L.J., defining the position of a statutory body in the position of the defendants, in *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*,[9] cited with approval by Scrutton L.J. in the *British Trawlers'* case.[10]

(2) The principle stated by Lindley L.J.[11] applies equally to rights given to the company by by-laws, so that once the defendants here had made a by-law—by-law No. 18—prohibiting the plying for hire by tugs within the dock, that by-law, as a matter of construction, would prevent the company from excluding tugs altogether from the dock.

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[4] [1933] 2 K.B. 14; 49 T.L.R. 327.

[5] [1934] A.C. 279; 50 T.L.R. 275.

[6] [1933] 2 K.B. 14, 29–31.

[7] Ibid. 47.

[8] Ibid. 58.

[9] [1892] 3 Ch. 242, 251; 8 T.L.R. 717.

[10] [1933] 2 K.B. 14, 34–5.

[11] [1892] 3 Ch. 242, 251.

(3) A power given to a statutory company to regulate does not entitle it to prohibit: *per* Lord Davey in *Municipal Corporation of City of Toronto* v. *Virgo.*[12] A statutory company has no power whatever to buy, hire, or license tugs except as given by its act of incorporation. Both sections 66 and 70 of the Act of 1901, on which the defendants rely, are concerned with tugs. By subsection (1) of section 66 the company takes the necessary power to license tugs, etc., and to do everything necessitated by subsection (3) of that section, which confers the right to have tugs, etc., to move vessels about. When one contrasts that with section 70, it is seen that section 70 only applies where a master takes his own tug into the dock. The proviso to that section plainly means that though the dock authority is by that section given power to build, hire, employ and license tugs, it has no right to require the master of any vessel coming into the dock or in the dock to employ one of its own tugs. That section is determinative of the issue here, because it says in express terms that there is no obligation on a ship's master to use the company's tugs. If it had been intended that the company should have power to exclude tugs, one would expect to find in the special Acts words similar to those in section 82 of the Clauses Act of 1847, which relates to meters and weighers and provides that those persons alone should be entitled to do work and that persons employing anyone else would be committing an offence against the provisions of the Act. On the application of the principle of Lindley L.J.,[13] therefore, the powers given in sections 66 and 70 impliedly prohibit the company from exercising or seeking to exercise any wider powers. See also *Dick* v. *Badart*[14]; *Port of London Authority* v. *Cairn Line of Steamships Ld.*[15]

A. A. Mocatta Q.C., *J. P. Ashworth* and *R. J. Parker* for the defendants. The dock authority desires, if it lawfully can, to exclude the plaintiffs' tugs, except on certain terms, and to restrict competition with themselves. The authority is under a duty under the Transport Act, 1947, to carry on the undertaking economically. Since May, 1951, they have suffered financially at the hands of the plaintiffs.

The three main questions of law are:

(1) Does section 33 of the Act of 1847 by itself give the plaintiffs the right to enter the dock to tow vessels in or out?

(2) If No, do the special Acts give the plaintiffs such a right?

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[12] [1896] A.C. 88, 93.

[13] [1892] 3 Ch. 242, 251.

[14] (1883) 10 Q.B.D. 387.

[15] [1913] 1 K.B. 497; 29 T.L.R. 229.

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(3) If Yes, do the special Acts limit the plaintiffs' rights under section 33?

The first question is of general importance. It is necessary first to look at the special Acts of 1901 and 1904, and also the instrument by which under the Transport Act, 1947, the company's functions were transferred to the dock authority.

[SELLERS J. You dispute the proposition that they are only entitled to act as a statutory authority is entitled to act?]

They are undoubtedly entitled to exclude trespassers: see *Barker* v. *Midland Railway*[16] and *Perth General Station Committee* v. *Ross*,[17] *per* Lord Watson and Lord McNaghten.[18] Those railway cases provide the background to the approach to special Acts, showing that the courts and the House of Lords have approached the matter with nice points in mind.

The general Act of 1847, which is only a clauses Act, contains no specific mention of tugs, so that their position has to be worked out as an incident in the light of general principles and the provisions of the special Acts. It is submitted that the words of section 33 do not cover the towing of vessels from which goods may later be shipped or unshipped any more than they cover taking ships in for repairs or for putting on crews or stores. None of the cases cited decided to the contrary on the construction of those words. *Dick* v. *Badart*[19] was concerned with persons directly engaged in the "shipping of goods" who could not be excluded by the dock authority. The plaintiffs rely on the *British Trawlers'* case,[20] but it should be noted that in the House of Lords their Lordships' speeches were on very narrow grounds, though the broad principles must have been much in their minds: see the speech of Lord Tomlin[21] giving his reasons, where he refers to the definition section. That was a very limited ground. In that case the "party with the vehicle" was going to ship and unship fish with the vehicle. Here the plaintiffs are doing nothing of the kind. The ship is going to ship the coal or unload the timber; the tug is merely going to tow the ship. It is not doing anything with regard to "shipping and unshipping." As soon as it has put the ship into position it goes away.

[SELLERS J. Isn't that very narrow and artificial? You say the question is: what function is the tug playing?]

Yes. *Great Central Railway Co.* v. *North-Eastern Steam*

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[16] (1856) 18 C.B. 46.

[17] [1897] A.C. 479.

[18] Ibid. 486–7, 491.

[19] 10 Q.B.D. 387.

[20] [1933] 2 K.B. 14.

[21] [1934] A.C. 279, 297–8.

Fishing Co. Ld.,[22] though not conclusive, is nearest to the present case. The facts there, given only in the report in The Times Law Reports, show that the tug was required to move trawlers within the dock in order, inter alia, to *unload* goods, that is, in the language of the section, to "unship" them, and Walton J. decided it in a way which showed that he did not regard section 33 as covering what the plaintiffs contend for. He said three times that he was not going to decide that persons were entitled to take vessels into the dock in tow. It did not go to appeal, but it has not been overruled and has no doubt often been followed.

[Sellers J. How does the lorry which brings the goods to the dock to be loaded, load them any more than the tug bringing a loaded ship unloads them?]

One brings the goods; the other brings the ship. It is a question of construing a few words in a statute and section 33 gives no right other than to the shipowners themselves.

If I am right on (1) there is no contention on my second point that the special Acts give the plaintiffs no right which they have not got under section 33. On (3) the special Acts incorporate the general Act of 1847 only so far as consistent with them: see section 2 of the Act of 1904. The opening words of section 66 (1) of the Act of 1901 are a proviso preserving the master's right to employ his own crew, but subject to that proviso, it is submitted, the company may license anything they think fit. If the rest of the subsection is merely an enabling power, why was the proviso put in? The proviso fits in with the defendants' submission on section 33, that is, that a shipowner has a right to come in and nothing takes that right away; but subject to the preservation of that right, the company may license tugs for all sorts of purposes. Section 70 gives the authority a general enabling power to acquire and use tugs, and section 66 (1) deals with particular matters, and gives the company the right to exclude tugs. The natural meaning of the proviso to section 70 is that the dock authority shall not insist on the shipowners entering or leaving the docks in charge of a tow.

It is difficult to apply the principle of implied prohibition enunciated by Lindley L.J.[23] if the plaintiffs have no right to enter under section 33, for the special Acts give them no right of entry. And if the general Act by itself gives them a right of entry, then, on my submission on section 66 (1), that section takes the

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[22] 22 T.L.R. 520. See Note, post, p. 355.

[23] [1892] 3 Ch. 242, 251.

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right away. As to Lord Davey's principle in the *Toronto* case [24] on regulation and prohibition, if I am right on section 33 and on section 66 (1) of the special Act, the question whether or not the right to regulate includes the right to prohibit does not arise.

The point on the by-laws does not arise here, for we are not arguing about plying for hire within the dock.

Aske Q.C. in reply. Most of the arguments for the defendants, except those on the special Acts, were raised in the *British Trawlers'* case [25] and considered in the speeches in the House of Lords. As to the submission that that case was decided on very narrow grounds in the House of Lords, there is no wider statement of broad principle in any of the speeches or judgments in that or any other case than that of Lord Tomlin [26] referring expressly to section 33; see also Lord Macmillan,[27] who said that the harbour should be open to all for unshipping goods, including the consequential purpose of removing the goods unshipped by vehicle. Those are both broad statements of principle on section 33.

Cur. adv. vult.

December 16. Sellers J. stated the facts and continued:— The whole question depends on whether the defendants, as the body responsible for the dock undertaking, are entitled to exclude tugs of the plaintiffs and others, and reserve towage services to their own tugs or such as they wish to hire to assist the services.

The plaintiffs claim that section 33 of the Harbours, Docks and Piers Clauses Act, 1847, gives them a right to take their tugs into the defendants' docks for such purposes at least as they have been recently engaged in and for which alone they contemplate using them in the future. The marginal note to the section is as follows: "Harbour, dock, and pier free to the public on "payment of rate." The section provides: "Upon payment "of the rates made payable by this and the special Act, and "subject to the other provisions thereof, the harbour, dock, and "pier shall be open to all persons for the shipping and unshipping "of goods, and the embarking and landing of passengers." The section provides that the docks shall be open to all persons. It does not say "to all ships or vessels," but it clearly includes them. The freedom of access is limited by the words "for the "shipping and unshipping of goods." To be open for the shipping and unshipping of goods a dock must of necessity be open for many and varied activities in and about the dock without which there could be no shipping or unshipping of goods. There could be no shipping of goods without a ship or without goods. Both must enter the dock. In ordinary circumstances, and certainly those which exist at Immingham, goods destined for shipment require a vehicle of some kind to bring them to the ship's side, and in many cases, and frequently at Immingham, a ship requires a tug or tugs to bring her to her berth for loading. Likewise goods have to be removed by vehicle from the quay after discharge, and ships have to be moved out after loading or discharge.

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[24] [1896] A.C. 88, 93.

[25] [1933] 2 K.B. 14.

[26] [1934] A.C. 279, 298.

[27] Ibid. 299–301.

A tidal river flows past the entrance to Immingham Docks, and a vessel entering and leaving has to allow for the effect of the current on the ship's course and manoeuvres. There is a risk of fouling the piers or jetties at the entrance, and to ensure safe movement to and from a berth in the dock a tug is frequently used by a vessel entering or leaving, and some vessels use more than one tug. For shipping and unshipping to take place in any commercial or business sense, it is necessary to employ skilled stevedores and labourers to load, discharge, trim, stow or otherwise handle the cargo on the ship and on the quay.

In interpreting the section, I would hold that any of the persons providing any of the facilities which I have mentioned and the persons engaged in such activities are persons to whom a dock must be open if it is to be open for the shipping and unshipping of goods. I can see no real distinction between the contractor who, by his vehicles, brings in the goods for shipment or removes them after discharge, the tug owner who, by his tugs, brings in and takes out vessels engaged in the shipping and unshipping of goods, and the shipowner who brings his ship to the port aided or unaided by tugs. They are all performing services without which goods cannot be shipped or unshipped by vessels using the port; and the section makes no discrimination between persons. Provided they resort to the docks for the shipping and unshipping of goods they are on an equality, and the shipowner does not appear to have any greater or better right than a stevedore or a haulage contractor, or, I could add, a tug owner, though the rights of all are subject to the payment of the appropriate dues which the dock authority may prescribe and subject to any regulation and control which the authority may have power, expressly or impliedly, to exercise.

The section in question has been considered by the courts and once by the House of Lords, but the present case is not, I think, precisely covered by authority; and, having stated the view to which I incline on the construction and application of the section, I must see whether authority supports or refutes it.

In *London and North-Eastern Railway Co.* v. *British Trawlers Federation Ld.*[1] Lord Tomlin, referring to section 33 of the Act of 1847, said[2]: "I do not think that the words 'shipping' and "'unshipping' are to be confined to the narrow operation of lifting "goods from the quay to the ship or from the ship to the quay, "nor do I think that the access under the section can be limited "to access in person without any vehicle. It must I think be "such access with such vehicle as the party seeking it bona fide "deems necessary, but it is an access always subject to be con-"trolled by valid and operative by-laws." Lord Macmillan expressed his opinion in this way[3]: "The harbour is to be open "to all for the purpose of unshipping goods. It is manifest that "this must include the consequential purpose of removing the "goods unshipped, and such removal necessitates the employ-"ment of the appropriate vehicles."

Those are not the narrow interpretations for which the defendants contend, and I think that they support and do not curtail the views expressed in the Court of Appeal in the same case.[4] Scrutton L.J. said[5]: "A great deal of discussion took "place as to the true meaning of this section. Counsel for the "railway company argued, without, I think, much conviction, "that 'unshipping' had a very limited meaning; it only covered "the operation of transferring goods from the ship to the quay, "and the dock company had full control over the subsequent "operation of taking the goods from the quay out of the dock "premises. This argument, besides being quite unbusinesslike, "gave no effect, in my opinion, to the words 'shall be open to the "'public.' The passenger has a right to 'embark' by entering "the dock premises, proceeding to the ship and embarking "thereon; he has a right to 'land' by leaving the ship and pro-"ceeding over the dock premises to their limits. The 'shipper' "of goods has a right to bring them on to the dock premises, and "through those premises to the ship on which they are shipped. "He has a right to 'unship' them by taking them from the ship "and out of the dock premises." Further on, the same Lord Justice said[6]: "I am clearly of opinion that the unshipper has "a right to the use of reasonable vehicles, motor or horse-drawn,

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[1] [1934] A.C. 279.

[2] [1934] A.C. 279, 298.

[3] Ibid. 301.

[4] [1933] 2 K.B. 14.

[5] Ibid. 29, 30.

[6] Ibid. 31.

"subject to reasonable regulation by the dock company as to "pace, place and time, having regard to the reasonable rights "of other members of the public and of the dock company. I "am also of opinion that the dock company has no right to "impose limitations on what the vehicles properly used in "shipping or unshipping shall do outside the dock premises." Lawrence L.J. said[7]: "In my opinion, the provision in section "33 of the 1847 Act, that upon payment of rates, the harbour "and dock shall be open to all persons for shipping and unshipping goods, necessarily implies that all persons shall have the "free right to remove the goods landed on the quays by the usual "commercial means." Greer L.J. said[8]: "I think it is necessarily implied in section 33 of the Harbours, Docks, and Piers "Clauses Act, 1847, that their docks and quays should be open "to all such persons as were interested in the shipment or unshipment of fish to remove the fish so unshipped by usual commercial methods, including the removal by means of motor or "other vehicles, or by their agents or contractors in that behalf "by such vehicles."

In *Dick* v. *Badart*[9] Cave J. held that section 33 must include not only shipowners and owners of goods, but also their respective servants. He held a by-law to exclude lumpers to be invalid, and said[10]: "A by-law that lumpers should only be employed subject "to good character might be within the company's power to "regulate the duties and conduct of persons employed in the "dock, but a by-law by which lumpers are altogether excluded "from the dock could not possibly be within it."

Another case on the section is *Great Central Railway Co.* v. *North-Eastern Steam Fishing Co. Ld.*,[11] the report of which was supplemented by the defendants by a transcript of the judgment of Walton J.[12] The decision is an authority for the proposition that section 33 of the Act of 1847 does not give trawler owners a right to keep a tug inside the dock for the purpose of rendering towage services as and when required to their own trawlers which regularly go in and out. The plaintiffs do not challenge this case, and make no claim to keep a tug inside the Immingham Docks or to ply for hire within the dock or at the jetties, which plying for hire, other than by the defendants' tugs, can only be done in pursuance of a licence issued by the dock-master. That is by-law 18. Walton J. did not seek to interpret the section except

[7] [1933] 2 K.B. 14, 47.
[8] Ibid. 58.
[9] 10 Q.B.D. 387.
[10] Ibid. 393.
[11] 22 T.L.R. 520.
[12] Reprinted in full, post, p. 355.

to say that it did not give the defendants, the trawler owners, the right to keep a tug inside the dock without the consent of the dock authority.

If the facts had been found as they were stated to be in the argument of Mr. J. A. Hamilton K.C.[13]—" The tug was required " to move the trawlers sometimes to the wharf or to a place " awaiting their turn to unload, or to a place where coal could " be loaded, or to bring coal lighters alongside, or to move the " trawlers to a place in the dock where ice (required for the " purposes of the next fishing voyage) could be taken on board. " The tug was necessary to move the trawlers after the boilers " had been blown, in accordance with the by-laws. Such assist- " ance was absolutely necessary and was used in the ordinary " course of business "—I doubt respectfully if I would have taken the same view of them as Walton J. appears to have done. It would depend, I think, on the frequency with which those services were normally rendered by the tug kept in attendance, but the actual decision was as I have stated, and it does not bear on the present case.

On behalf of the defendants the railway cases are relied on, *Barker* v. *Midland Railway Co.*[14] and *Perth General Station Committee* v. *Ross*,[15] but they are of no application. It was so held in the *British Trawlers'* case.[16] Section 33 of the Act of 1847 did not, of course, arise for consideration at all in those cases.

I am therefore of opinion that authority does not refute the interpretation which I have given to section 33, but substantially supports it, and, as it stands, section 33 would entitle the plaintiffs to enter the dock with their tugs in the manner which has been their recent practice and which is their present demand.

The section is, however, made expressly subject to any special Act, and the defendants rely further on their powers as owners and undertakers, and on sections 66 and 70 of their Act of 1901. Before considering those two sections, I will refer briefly to an authority which defines the position of a statutory body in the position of the defendants. In the *British Trawlers'* case in the Court of Appeal Scrutton L.J.[17] referred with approval to the observations of Lindley L.J. in *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*,[18] as follows: " The legislature has expressly conferred upon the

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[13] 22 T.L.R. 520.

[14] 18 C.B. 46.

[15] [1897] A.C. 479.

[16] [1934] A.C. 279.

[17] [1933] 2 K.B. 14, 35.

[18] [1892] 3 Ch. 242, 251.

"company many powers which the company, as the owner of "property, could have exercised without any express statutory "authority. Whenever this is the case, the powers expressly "given must be treated either as superfluous or as purposely "inserted in order to define, that is, limit the right conferred, "and as implying a prohibition against the exercise of the more "extensive rights which the company might have by virtue of its "ownership of property. That the latter is the true mode of "regarding statutory powers conferred on bodies created for "public purposes and authorized to acquire land for such "purposes cannot, I think, admit of any doubt."

Greer L.J., in the *British Trawlers'* case,[19] pointed out the distinction between companies created by charter, which are deemed to have all the powers of a natural person, and companies created by statute. He quoted the then current edition of Buckley on Companies and the statement therein that a "statute "does not create a corporation at common law. It creates a "statutory creature, which cannot go beyond its statute for the "reason that to the statute it owes its whole existence."

Section 70 of the defendants' Act of 1901 empowers the defendants to build, purchase, hire or license steamers and tugs for the purpose of and in connexion with the dock, and to make charges in respect of the use of any such vessels provided and used; and at the end of the section there is this proviso: "Provided always that nothing in this Act contained shall be deemed "or construed to authorize the company to require any owner "agent master consignee or other person having charge of any "vessel lighter or river craft to employ hire or use any such "steamer tug lighter or other ship or boat." The defendants, therefore, cannot make it compulsory for ships to use their tugs, and since the use of tugs, lighters or boats will, or may, from time to time be necessary, and since the port has to be open to the public for the shipping and unshipping of goods, it follows, I think, that if tugs other than the defendants' tugs were excluded, the rights of the users of the port would be curtailed and infringed. If shipowners wished to use the port, and if tug assistance was essential to enable them to do so in safety, the use of the defendants' tugs (and this would include those chartered or hired by them) would in effect be compulsory and the defendants would so achieve that which they are so definitely

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[19] [1933] 2 K.B. 14, 56.

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J. H. PIGOTT & SON v. DOCKS AND INLAND WATERWAYS EXECUTIVE.

Sellers J.

prohibited by the proviso from doing. Far from giving the defendants the right to exclude tugs, as they now claim to do, in my opinion section 70 effectively prohibits them from so doing. The proviso does not refer only to the section, but also to " nothing in this Act." The proviso, therefore, refers equally to section 66 (1) on which the defendants place perhaps their greatest reliance.

Section 66 in terms gives the company powers " with regard " to the management use and regulation of the dock works of the " company and the regulation and control of vessels resorting " thereto." Nowhere is an express power given to exclude tugs. It is submitted on behalf of the defendants that section 66 (1) by implication gives that power. In the face of the proviso to section 70 to which I have just referred, I do not find it possible to make such an implication.

Section 66 (3) empowers the company to employ persons " to " work or remove or to discharge or load or perform any service " in connexion with any vessel," when there is delay or default in the working or removing of any vessel in the dock. Section 66 (1) makes these rights of the company " subject to the right " of the owner or master of any vessel to employ his crew in the " performance of any of the services " mentioned in the other three subsections of section 66. The whole section gives defined powers to the company, but it does not give them exclusive powers or any power to exclude which they do not otherwise possess.

In contrast, section 82 of the Harbours, Docks, and Piers Clauses Act, 1847, which relates to meters and weighers, expressly provides that " the master of any vessel, or the owner " of any goods shipped, unshipped, or delivered within or upon " the harbour, or dock, or pier, shall not employ any person " other than a weigher or meter licensed by the undertakers." This was referred to by Cave J. in *Dick* v. *Badart*[20]; and see also *Port of London Authority* v. *Cairn Line of Steamships Ld.*[21] Similar clear clauses are to be found in many other Acts, where some exclusive right was intended to be given to undertakers. There is no such provision here relating to tugs. The words of Lord Davey in *Municipal Corporation of City of Toronto* v. *Virgo*[22] may be applied to the present case: " No doubt the " regulation and governance of a trade may involve the

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[20] 10 Q.B.D. 387.

[21] [1913] 1 K.B. 497.

[22] [1896] A.C. 88, 93.

"imposition of restrictions on its exercise both as to time and "to a certain extent as to place where such restrictions are in "the opinion of the public authority necessary to prevent a "nuisance or for the maintenance of order. But their Lordships "think there is marked distinction to be drawn between the "prohibition or prevention of a trade and the regulation or "governance of it, and indeed a power to regulate and govern "seems to imply the continued existence of that which is to be "regulated or governed."

In my judgment, the plaintiffs have established the right for their tugs to enter the Immingham Docks at least to the extent for which they claim, and there is no power in any statute affecting the defendants' rights which entitles the defendants to exclude tugs operating in the way the plaintiffs' tugs have been doing. The interdepartmental correspondence of the defendants to which I was referred revealed less desire on the part of those responsible for the port's administration to have the tug services at Immingham highly efficient and adequate than to stultify competition to benefit their own tugs, which apparently could not hold their own in a busy port. So far as I understand the position, the decision at which I have arrived is more likely to provide efficient and suitable towage services at this important port than if the defendants' claim for a monopoly had prevailed.

I grant the declaration: that on payment of the rates made payable under the Humber Commercial Railway and Dock Act, 1901, and any statutory amendment or modification thereof the plaintiffs are entitled in the ordinary course of their business to employ their tugs in providing towage services to vessels entering or leaving Immingham Docks for the shipping or unshipping of goods and/or embarking or landing of passengers.

Judgment for the plaintiffs.
Declaration granted.

Solicitors: *Theodore Goddard & Co., for Andrew M. Jackson & Co., Hull; M. H. B. Gilmour.*

M. M. H.

K.B.Div.

1906
May 7.

Walton J.

NOTE.

GREAT CENTRAL RAILWAY CO. *v.* NORTH-EASTERN STEAM FISHING CO. LD.

Walton J. The plaintiffs, the Great Central Railway Co., are the owners of a dock or docks at Great Grimsby, the fish docks, and the defendants, the North-Eastern Steam Fishing Co. Ld., and the other defendants are the owners of the steam-tug *Speedwell.* The claim is as follows: By letters dated February 29, 1904 (addressed to Mr. Simons, the then owner of the said steam-tug), September 12, 1904, and July 1, 1905, notice was given on behalf of the plaintiffs, terminating the permission previously given from time to time by them for the steam-tug to occupy their fish docks, and to perform towage services for hire therein, and requiring the defendants to remove their steam-tug from the fish docks; and it is said that the defendants have not removed their steam-tug from the fish docks but persist in unlawfully occupying the fish docks and performing towage services for hire therein with their steam-tug without any leave or licence from the plaintiffs, and in spite of the plaintiffs' notices. The plaintiffs claim a declaration that the *Speedwell* is not entitled to remain in their docks, and they claim an injunction and damages.

It is admitted that the fish docks at Great Grimsby belong to the plaintiffs—they are part of their undertaking, regulated by the Manchester, Sheffield and Lincolnshire Railway Company Act, 1849. With regard to the permission given by the plaintiffs before the controversy in this action began, the defendants say that if any such permission was given, it was ultra vires; they deny that they used the docks by permission of the plaintiffs, and they say that the notices given were ultra vires and were invalid as notices requiring the defendants to remove their tug. They say they have not used the docks otherwise than in a reasonable manner; and then they go on to say this: The defendants' fishing vessels are entitled to reasonable user of the docks, and, according to the usual course of trade and user of the docks, they require to be moved from time to time by tugs available at call for that purpose. The plaintiffs threaten and intend to exclude the defendants' tug and to compel them to use the plaintiffs' tugs only, which they have no right to do. The defendants further say that they have not claimed, and do not claim, to keep their steam-tug in the plaintiffs' docks except for the purposes mentioned; and they admit that if they do use the docks they must do so under the regulations and by-laws which have been properly made from time to time under the Act of Parliament.

The use which the defendants say they have a right to make of the docks with their tug, as I understand it, is this. The defendants are owners of a number of steam trawlers, which bring their fish from time to time into the fish docks at Great Grimsby; they enter the docks and usually get alongside the quay under their own steam. They discharge their fish at the quay, and then, before they go out to sea again for fishing, they have to take on board a certain quantity of ice which they get in the docks, and a certain quantity of coal, and they have to be moved to another place where they get their ice, and to yet another place for their coal; or they have to be moored somewhere in the docks where they receive their coals from barges or lighters. That being so, of course these steam trawlers have to be moved about to a certain extent in the docks; and what the defendants claim is the right to keep this tug inside the docks, not for the purpose of bringing the steam trawlers into the docks, but for the purpose of moving them about, first one and then another, as required in the docks. They say that it is reasonable and convenient to have a tug always at hand in the docks for the use of these trawlers which have to be moved from time to time. The defendants are owners of a certain number of trawlers and there is no doubt that it is convenient for them to have this tug at hand inside the docks to move their trawlers as required. The question which I have to decide in this case is whether they have a right to keep their tug inside the docks for that purpose. They say that they have a right to have their tug there for such a purpose. The plaintiffs, the Great Central Railway Co., say: "No, these docks belong to us and you "have no right to keep a tug in our docks without our leave or unless "you have some agreement with us by which we consent that you "should do so under certain terms, and we do not consent and we will "not; you must take that tug away." I have to say which is right.

The special Act which relates to the user of these docks is the Act of 1849, which incorporates the Harbours, Docks, and Piers Clauses Act, 1847. Many of the sections of the Act of 1849 were referred to, but I do not think that it is necessary for me to refer to them for the purposes of this judgment. I merely call attention to this—that by section 247 of the Act of 1849 the plaintiffs are entitled to provide tugs for the purpose of "towing and assisting vessels entering into, using, or "going out of the said docks," on certain terms and making certain charges which are not to exceed certain sums that are mentioned in the section. Of course, that does not settle the present case. It gives powers to the plaintiffs to provide the facilities, which the defendants desire to provide for themselves.

That being so, what are the rights? The plaintiffs are the owners of the docks; but I think it is plain that they cannot close these docks absolutely to the world at large. The public have certain rights. Is the right claimed by the defendants one of them? What are the public rights? So far as I can ascertain, they are to be found, and I think only to be found—at any rate so far as affects the present case—in section 33 of the Harbours, Docks and Piers Clauses Act, 1847. [His Lordship read the section.] That is to say, all persons may take vessels into the docks for the purpose of shipping or unshipping goods, and they may send men to the docks, I think, to provide the labour necessary for the purpose of shipping and unshipping goods. (I leave out the embarking and disembarking of passengers, because that does not matter here.) I think they clearly may do that. It may be, but I have not to decide it, that persons are entitled to take their vessels into the docks, for the purpose of shipping or unshipping goods, in tow. It may be that the owner of a fishing smack is entitled to take his smack into these fish docks with the assistance of a tug. I have not to decide that. It may be, but perhaps it is more doubtful, that when a vessel

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GREAT CENTRAL RAILWAY CO. *v.* NORTH-EASTERN STEAM FISHING CO. LD.

Walton J.

goes into the docks, it may have a tug in attendance. I have not to decide that. What the defendants claim is this: the right to maintain what I may call the services of a tug inside the docks, and to occupy the docks for that purpose. Does section 33 give that right or not? I do not know that I ought to occupy time in discussing all the various arguments pro and con which were addressed to me in the course of the trial. I think it is enough for me to say that the conclusion I have arrived at is, that the defendants have no such right without the consent of the plaintiffs, and that they are not entitled to keep their tug inside the docks for the purpose of assisting such of the steam-trawlers as go into the docks, and as are the property of the defendants. I noticed in the points of claim that it is alleged that they claim or seek to keep the tug inside the docks to perform towage services for hire. I do not think in the course of the case I heard anything of the tug *Speedwell* being used for hire. I understand it was there to be used for the purposes of the trawlers which belong to its owners. Therefore I have not attached any importance to the claim that the tug is to be retained there for hire, because I do not think it is.

I think substantially the plaintiffs succeed.

Judgment for the plaintiffs.

LLOYD *v.* SINGLETON.

1953
Jan. 20.

Lord Goddard C.J., Croom-Johnson and Pearson JJ.

Road Traffic—Motor vehicle—Third party insurance—Permitting person to use uninsured vehicle—Permission not confined to that of owner of vehicle—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 35 (1).

The offence under section 35 (1) of the Road Traffic Act, 1930, of permitting another person to use a motor vehicle which is not insured against third party risks can be committed not only by the owner of the vehicle but also by a person who is responsible for its care, management or control.

Dictum of MacKinnon L.J. in *Goodbarne* v. *Buck* [1940] 1 K.B. 771, 774; 56 T.L.R. 433, 435; [1940] 1 All E.R. 613, 616, disapproved.

CASE STATED by Southport justices.

On October 3, 1951, an information was preferred by the prosecutor, William Herbert Lloyd, a deputy chief constable, against the defendant, Orme Fitzgerald Singleton, charging him that on September 9, 1951, he unlawfully permitted Charles Eric Singleton to use a certain vehicle, namely, a Jowitt Bradford lorry, on Weld Road, Southport, there not being in force in relation to its user a policy of insurance in respect of third party risks, contrary to section 35 of the Road Traffic Act, 1930.[1]

The following facts were proved or admitted: At 12.15 a.m. on September 9, 1951, a police officer stopped the lorry, which was being driven by Charles Eric Singleton, the defendant's brother, who was unable to produce a certificate of insurance covering the use of the vehicle. The vehicle was owned by Axfords Ld., of Chorley, Lancashire, of which one Jack Rubin was managing director. The defendant was the company's assistant general manager, to whom the vehicle was entrusted for carrying out the duties of the company and who had full discretion as to its use for the company's business. Charles Eric Singleton was not an employee of the company. At 11.45 p.m. on September 8, 1951, the defendant and his brother were at a club in Southport with the lorry when the defendant, who was ill, asked his brother to drive the lorry to the place where it was normally kept. In the course of that journey he was stopped by the police officer. There was in force on September 9 a policy of insurance in the name of Mr. Rubin, as director of the company, covering the vehicle when driven with the policy holder's permission. Mr. Rubin had not given the defendant's brother permission to drive the vehicle on that day.

The prosecutor contended that any person who had control of a vehicle was in a position to forbid any other person to use the vehicle and could permit another to use it contrary to section 35 (1), any expression to the contrary in *Goodbarne* v. *Buck*[2] being obiter. The defendant contended that that case was a direct authority on the point.

The justices were of opinion that, having regard to the statement of MacKinnon L.J. in *Goodbarne* v. *Buck*,[3] only the owner of a motor vehicle could permit its use contrary to section 35 (1), and that, the defendant not being the owner of the lorry, he could not be guilty of permitting its use. They held further that, if on the facts found by them the defendant's instructions to his brother were given within the scope of the defendant's authority, the permission could only be that of the owner of the lorry, namely, Axfords Ld., and they dismissed the information.

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[1] Road Traffic Act, 1930, s. 35 (1): "Subject to the provisions of "this Part of this Act, it shall not be "lawful for any person to use, or "to cause or permit any other person "to use, a motor vehicle on a road "unless there is in force in relation "to the user of the vehicle by that "person or that other person, as the "case may be, such a policy of insur- "ance or such a security in respect "of third-party risks as complies with "the requirements of this Part of this "Act."

[2] [1940] 1 K.B. 771; 56 T.L.R. 433; [1940] 1 All E.R. 613.

[3] [1940] 1 K.B. 771, 774.

The prosecutor appealed.

P. T. S. Boydell for the prosecutor.
R. C. C. J. Binney for the defendant.

LORD GODDARD C.J. [after stating the facts:] The justices dismissed the charge because a dictum of MacKinnon L.J. in *Goodbarne* v. *Buck* [3] was cited to them which, it is clear, the Lord Justice uttered per incuriam. The dictum obviously went further than was necessary, because the Lord Justice was not thinking of the particular circumstances which arose here. That was a case in which two brothers were engaged in a very disreputable transaction. W. E. Buck was in need of money and borrowed some from his brother, H. A. Buck, to buy a car. Having borrowed the money, when W. E. Buck bought the car it was his car and not his brother's. While driving the car, W. E. Buck ran over and killed somebody, and the dead person's widow sought to recover damages from H. A. Buck on the ground that, in breach of his statutory duty under the Road Traffic Act, 1930, he permitted his brother to drive the car while it was uninsured. A policy of insurance had been taken out in the name of H. A. Buck when he was not the owner of the car, and the insurance company repudiated the policy, so that the car was wholly uninsured. H. A. Buck was held not to be liable because his brother and not he was the owner of the car. Therefore, it could not be said that H. A. Buck was permitting his brother to drive the car because he could drive it without any permission.

In giving judgment MacKinnon L.J. said [3]: "In order to "make a person liable for permitting another person to use a "motor vehicle, it is obvious that he must be in a position to "forbid the other person to use the motor vehicle." Everybody would agree with that, and if the Lord Justice had stopped there no difficulty would have arisen, but he continued: "As at present "advised, I can see no ground on which any one can be in a "position to forbid another person to use a motor vehicle except "where he is the owner of the car." If that had been a reserved judgment no doubt either the Lord Justice or the other members

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[3] [1940] 1 K.B. 771, 774.

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of the court would have pointed out that the situation could arise which arose here, in which a car was entrusted by the owner to a driver who had the care, management and control of the car. That person, of course, could permit other people to drive and might be entitled to permit certain people to drive, but not others. I put in the course of the argument the illustration of a person, owning a car and employing a chauffeur, who left the car, as he naturally would, in the care of his chauffeur. If when the master was not in the car the chauffeur allowed somebody else to drive it, the chauffeur would be permitting the use of it. The master would not be, because he would not know that it was being used. He would have given no authority to his chauffeur to allow other people to drive; in fact, in the ordinary way he would forbid his chauffeur to allow anybody else to drive, but whether he was actually forbidden or not, the person who had permitted the driving would be the chauffeur. Such a case was not in the Lord Justice's mind when he uttered the second part of the dictum cited. He had not thought, in giving an extemporary judgment, of all the various permutations which could arise.

Though I can well understand that the justices thought that they were bound to follow that dictum in the present case, it is clear that it went beyond what was necessary, and this court feels obliged to say that they do not agree with it. It is clear that the defendant here was in a position to forbid his brother to drive, but, instead, he requested him to do so. This case must go back to the justices with the opinion of the court that they did not come to a correct determination in point of law. The justices must now further consider the policy and come to the conclusion whether the car was insured or not.

CROOM-JOHNSON J. Section 35 (1) of the Road Traffic Act, 1930, provides: "Subject to the provisions of this Part of this "Act, it shall not be lawful for any person to use, or to cause or "permit any other person to use, a motor vehicle" which is uninsured against third party risks. Here a person did permit somebody else to use a motor vehicle, and Mr. Binney's sheet anchor is the observations of MacKinnon L.J. in *Goodbarne* v. *Buck*.[3] The observations clearly were obiter in the case which had to be decided, and I concur in my Lord's view that they must have crept into that judgment, which was not a reserved judgment, per incuriam. Mr. Binney's other argument was that in this case what was done did not amount to permission, but he did not convince me, and I agree with the judgment which has been proposed by my Lord.

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[3] [1940] 1 K.B. 771, 774.

PEARSON J. I agree and have nothing to add.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co., for R. E. Perrins, Town Clerk, Southport; Hancock & Scott, for Bellis, Son & Co., Southport.*

J. D. P.

KENT *v.* CONNIFF AND ANOTHER.

C. A.

1952
Nov. 24, 25, 26;
Dec. 17.

Singleton, Birkett and Morris L.JJ.

[1951 K. 589.]

Landlord and Tenant—Agricultural holding—Covenant in lease to keep buildings in repair—Breach—Landlord's claim for damages brought during continuance of tenancy—Whether action barred by Agricultural Holdings Act—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 57.

The tenants of an agricultural holding committed breaches of a repairing covenant in their lease and failed to farm according to the rules of good husbandry. The landlord served on them a schedule of dilapidations and a notice under section 146 of the Law of Property Act, 1925, requiring them to remedy the breaches of covenant within two months of the service of the notice. The tenants did not comply, and the landlord issued a writ claiming forfeiture of the unexpired term and damages for the breaches of covenant. At the hearing, the tenants contended that, by virtue of section 57 of the Agricultural Holdings Act, 1948, the landlord could only claim compensation when the tenants quitted the holding on the termination of the tenancy, and that his claim for damages was, therefore, premature. The trial judge held that the section did not apply and awarded damages. On appeal by the tenants:—

Held, that the landlord's right to bring an action in the courts for breaches of covenant during the term of the tenancy was not affected by the Agricultural Holdings Act, 1948, and that he was, accordingly, entitled to damages, although the term had not expired when he issued the writ.

Section 57 (1) and (3) of the Act of 1948 gave a landlord an option whether to claim statutory compensation under subsection (1) in respect of the state, at the time of quitting, of parts of the holding caused by bad husbandry or, alternatively (if a written contract enabled him so to do) to claim compensation in respect of the state of the holding at the time of quitting under the terms of that contract. These remedies were mutually exclusive and both only applied to matters which arose on the tenant's quitting the holding at the termination of the tenancy. But where breaches of covenants occurred during the term and the landlord had not elected to wait until the end of the term and to bring his claim within section 57, there was nothing in the Act which compelled him to do so.

Decision of Slade J. [1952] W.N. 342; [1952] 2 T.L.R. 209 affirmed.

APPEAL from Slade J.

By a lease dated April 8, 1938, the plaintiff's predecessor in title demised to the defendants' predecessors in title an agricultural holding of about five acres at Woodmansterne for a term of seven years from March 25, 1938, at a yearly rent of £40. The lease contained an option to renew once for a further seven years and that option was duly exercised, so that, subject to the provisions of the Agricultural Holdings Act, 1948, the tenancy was due to expire on March 25, 1952. The lessees were required to use the premises as a nursery only, and they covenanted to keep the erections and buildings on the land and the boundary wall and fences in good and tenantable repair. Clause 4 of the lease contained a proviso for re-entry if, among other things, there should be any breach of covenant on the lessees' part.

The plaintiff, Thomas Herbert Kent, became assignee of the reversion of the lease on February 24, 1949. In December, 1950, he served on the defendants (who had taken an assignment of the lease on March 27, 1940), a schedule of dilapidations specifying 67 items (some being in respect of matters of husbandry) and a notice under section 146 of the Law of Property Act, 1925, requiring them to remedy the alleged breaches within two months. The lessees failed to comply with the requirements of the notice, and, on May 11, 1951, the plaintiff issued a writ claiming forfeiture of the lease and damages in respect of the breaches of the covenant.

At the hearing before Slade J. the defendants took the point that the action was premature, for they submitted that, reading sections 57 and 65 of the Agricultural Holdings Act, 1948,[1] together, the landlord could only bring his claim

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[1] Agricultural Holdings Act, 1948, s. 5 (1): "Where there is not in force "in respect of a tenancy of an agri- "cultural holding, whether created "before or after the commencement "of this Act, an agreement in writing "embodying the terms of the tenancy, "or there is such an agreement in

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at the termination of the tenancy when the tenant had actually quitted the holding. At the time of the action the contractual term had not expired and, by virtue of section 3 of the Act of 1948, it would, after the end of the term, have become a tenancy from year to year. The defendant tenants themselves at a later date served a notice terminating the tenancy on March 25, 1953, but at the material time when the action was brought they were still in possession by virtue of the lease, and the plaintiff did not know that they would serve a notice to terminate.

Slade J. was satisfied that there had been breaches of covenant, but he declined to grant a forfeiture as he considered that the defendants had been given insufficient time to remedy the breaches. He awarded damages to the plaintiff in respect of the breaches, holding that section 57 of the Act did not apply. The defendants appealed on that point.

W. D. Collard for the defendants. The action is premature and can only be brought, if at all, at the termination of the

"force but it contains no provision "for one or more of the matters speci- "fied in the First Schedule to this "Act [which by paragraph 9 specifies "—'A power for the landlord to re- "'enter on the holding in the event "'of the tenant not performing his "'obligations under the agreement'], "the landlord or the tenant of the "holding may, if he has requested "his tenant or landlord to enter into "such an agreement . . . but no such "agreement has been concluded, refer "the terms of the tenancy to arbitra- "tion under this Act."

S. 57 (1): "The landlord of an "agricultural holding shall be entitled "to recover from a tenant of the "holding, on the tenant's quitting "the holding on the termination of the "tenancy, compensation in respect of "the dilapidation or deterioration of, "or damage to, any part of the hold- "ing or anything in or on the holding "caused by non-fulfilment by the "tenant of his responsibilities to "farm in accordance with the rules "of good husbandry. . . . (3) Not- "withstanding anything in this Act, "the landlord may, in lieu of claim- "ing compensation under subsection "(1) of this section, claim compensa- "tion in respect of matters specified "therein under and in accordance "with a written contract of tenancy, "so however that—(*a*) compensation "shall be so claimed only on the "tenant's quitting the holding on the "termination of the tenancy; and "(*b*) compensation shall not be "claimed in respect of any one hold- "ing both under such a contract and "under the said subsection (1)."

S. 65 (1): "Save as expressly pro- "vided in this Act, in any case for "which apart from this section the "provisions of this Act provide for "compensation, a tenant or landlord "shall be entitled to compensation in "accordance with those provisions "and not otherwise. . . . (2) Nothing "in the said provisions, apart from "this section, shall be construed as "disentitling a tenant or landlord to "compensation in any case for which "the said provisions do not provide "for compensation, but a claim for "compensation in any such case as "aforesaid . . . shall not be enforce- "able except under an agreement in "writing."

tenancy when the tenants have quitted the holding. That is the effect of sections 57 and 65 of the Agricultural Holdings Act, 1948 (for it is conceded that the premises let are an "agricultural "holding" within the scope of the Act). As the defendants hold under a written contract of tenancy, if they commit breaches the landlord has a statutory remedy and can claim compensation under section 57 (3), or, alternatively, in so far as the breaches of the contract are also breaches of the rules of good husbandry, he can claim under section 57 (1). But under either subsection he cannot claim until the tenants quit the holding on the termination of the tenancy. As statutory compensation is available, section 65 applies and the ordinary contractual right of the landlord to sue in the courts for damages as soon as breaches are committed is overridden by the statutory provisions. The plaintiff sought to show that section 57 had only a limited application and was not intended to affect the landlord's contractual rights. He supported his submission by pointing out that the section did not, apparently, provide compensation for breaches of an oral tenancy agreement unless such breaches came within subsection (1). That is not, however, a real loophole, for the policy of the Act is to encourage written contracts and it is open to any tenant to obtain a written agreement by invoking the provisions of section 5. Section 57 is intended to have general application. It gives the landlord an option either to rely on the new statutory compensation under subsection (1), or to claim compensation in accordance with the terms of the contract under subsection (3), "in respect of "matters specified." It is submitted that those words, referring back to subsection (1), do not, as the plaintiff suggests, limit the scope of subsection (3) to breaches of the rules of good husbandry, but refer to damage caused by "dilapidation or deterioration," and apply, therefore, to anything which is a non-fulfilment of the contract of tenancy. If, however, it is held that subsection (3) is limited to breaches of good husbandry (which would mean that the apparent option given to the landlord by section 57 is illusory) then I submit that all, or substantially all, the breaches of which the landlord complains here were, if proved, breaches of the rules of good husbandry, in respect of which he could have claimed compensation under subsection (3).

Section 57 takes away the right of the landlord to sue for damages during the term of the tenancy, but he is not left without remedy for the Act reserves power to the Minister to maintain standards, and it is still open to a landlord to sue for forfeiture or for an injunction. It is, however, the policy of the Act that, as far as possible, a tenant of an agricultural holding should be free from interference from his landlord until he is actually quitting the holding on the termination of the tenancy. Then, and not before, the Act envisages a settlement between the landlord and his tenant of all outstanding matters, the landlord being entitled to compensation for deterioration or dilapidation and the tenant to claim for improvements to the holding by "high farming." The landlord can, at that time, I suggest, choose whether to go to arbitration on a claim under section 57 (1), or to sue for damages in the courts, relying on his contract of tenancy and claiming under subsection (3) of section 57. He will probably prefer to rely on the contract in cases where the contract is more stringent than the rules of good husbandry as defined in the Act; but whichever procedure he chooses, his claim can only be brought when the balance is struck between landlord and tenant on the tenant's quitting the holding.

It is difficult to see how a contrary construction of section 57 could be worked. If a landlord could sue for breaches of contract as soon as they were committed, and during the term, but had to wait until the end of the term to bring a claim before an arbitrator for breaches of the rules of good husbandry, it would be extremely difficult for the arbitrator to work out the measure of compensation under section 57 (2) (for the measure of damages under subsection (2) is higher than the usual measure of damages applied by the courts for breach of a covenant to repair). Indeed the whole of the arbitration procedure under section 70 would be completely disorganized if a landlord could enforce his contractual rights in a court of law prior to the termination of the tenancy. Further, it would tend to defeat the policy of the Act to improve farming for there is nothing in the Act which would compel a landlord who had received damages during the term to spend the money in making good the damage done by the tenant.

The specific provision in section 7 (which deals with the transfer of burdens) that a landlord may in certain circumstances recover compensation from his tenant before the end of the term supports the view that the legislature did not contemplate that, as a general rule, compensation would be payable until the end of the term; otherwise section 7 would be otiose.

If the intention of the Act was, as I submit, to postpone claims against the tenant until he quitted, the words used by the draftsman in section 57 are apt and clearly carry that meaning. It is possible that they also operate to insist that claims in respect of matters arising at the end of the term are made then, and at no other time, but that does not prevent them from carrying the meaning I suggest, and there is nothing which indicates that the section is dealing only with matters (such as a breach of a covenant to yield up in repair) which arise on the termination of the tenancy.

In construing an obscure provision in an Act of Parliament it is permissible to have regard to the " mischief " of the Act. The Act of 1948 was intended to offer the maximum inducement to owners and occupiers of agricultural land to observe the rules of good husbandry and it sought to attain these ends, first, by conferring security of tenure, secondly, by relieving the tenant of worry and anxiety during the term (to some extent by making provision for a general settlement at the end of the tenancy), and, finally, by providing a complete code on all matters relating to the uses of agricultural land. It is submitted that the court would, as far as possible, adopt a construction of section 57 which achieves these ends. It is true that the construction which is favoured modifies the contractual rights of the landlord to some extent, and Scrutton L.J. said in *In re Arden and Rutter* [2] that contractual rights could only be taken away by express words and not by inference. But here the words can bear the meaning, which I submit is the correct one. Further, the deliberate omission of the express reservation of contractual rights which is made in the corresponding sections of earlier legislation (Agricultural Holdings Act, 1923, ss. 9 and 10) strongly support the contention that the legislature intended to modify the contractual right to sue for damages and has done so.

L. A. Blundell for the plaintiff landlord. Section 57 does not apply to this claim for it is dealing with claims for compensation as distinct from damages. Alternatively, the section is only concerned with matters which arise at the termination of the term when the tenant quits. *Gulliver* v. *Catt* [3] is binding on that point. Slade J. said that the decision in that case did not involve a decision on section 57 but turned on section 99. I submit, however, that in the Court of Appeal the case was dealt with on two alternative grounds and the appeal was dismissed on both grounds, first, because of the effect of section 99 (which, of course, is not in point now), but, secondly, because, as Singleton L.J. said,[4] section 57 was " dealing with a position which arises on the " tenant quitting the holding on the termination of the tenancy "

[2] [1923] 2 K.B. 865, 878.

[3] [1952] 2 Q.B. 308; [1952] 1 T.L.R. 956; [1952] 1 All E.R. 929.

[4] [1952] 2 Q.B. 308, 313.

of the holding. Both points were part of the ratio decidendi and are binding on this court.

As section 57 has no application, there is no provision in the Act which brings section 65 into operation and nothing, therefore, which bars the landlord from bringing his action for damages during the term.

The defendants rely on what they regard as the policy and intention of the Act, but, as Scrutton L.J. said in *In re Arden and Rutter*,[5] the court will not draw inferences which have the effect of taking away contractual rights. That can only be done by express words, and if the construction of a section is doubtful there is a presumption in favour of the preservation of common law rights. Here the draftsman did not exclude the common law rights, except as in sections 11 and 70, and I submit that he did not intend to do so.

Slade J. looked for some clear words which would have the effect of taking away the contractual rights of the landlord to sue for damages, but he could not find any in section 57. Subsection (1) gives an additional statutory right to the landlord which arises on the tenant quitting the holding. That right is clearly limited to breaches of the rules of good husbandry and it only arises when the tenant quits. Subsection (3) is in lieu of subsection (1). It gives the landlord the option, instead of exercising his right under subsection (1), to rely on the terms of the contract and to sue for damages for breaches of covenant; but the provision is still dealing with the position which arises when the tenant quits. The choice is one which he can make when the event envisaged by subsection (1) comes to pass; it is a right in lieu of and arises at the same time as the other right. Both subsections must be construed together. They both relate to matters which arise on the termination of the tenancy when the tenant actually quits, and claims in respect of those matters must be brought then, and at no other time. [Counsel referred to *Olive* v. *Paynter*.[6]]

Here the tenant had not quitted the holding, and when the action was brought there was no prospect of an early termination of the tenancy. The landlord was not, therefore, relying on anything arising on quitting the holding, but he was suing in respect of matters which were independent of rights given or preserved by the statute at the termination of the tenancy when the tenant would ultimately quit the holding.

[5] [1923] 2 K.B. 865, 878.

[6] [1932] 2 K.B. 666.

The general policy of the Act cannot be brought in to deprive a subject of his common law rights. But even if it could be used here it would not help the defendants. The policy as shown by the provisions of the Acts themselves (which are the only sources relevant to consider) is to promote efficient farming. By the Act of 1947 that policy was applied impartially between landlords and tenants. It involved a certain element of State interference, supervision orders, etc., but there was nothing in that Act which showed a general intention to supersede the contractual rights of landlords or tenants. It reinforced the contractual rights of landlords in so far as they were directed to improve farming and did not supplant them. The Act of 1948 goes farther but there is still no general attempt to take away the rights of individual landlords except to the limited extent stated. The Act does not provide a complete code superseding all contractual rights (that is shown by section 101).

The provisions directed to a striking of a balance between the landlord and the tenant at the end of the term do not of themselves give rise to an assumption that the Act is intended to strike at the ordinary contractual rights during the continuance of the term, except where specifically stated, and in any case such an assumption would not be sufficient, having regard to the principle stated by Scrutton L.J. in *In re Arden and Rutter.*[7] I submit that an action brought during the continuance of the tenancy is independent of the provisions and limitations of the Act of 1948 and is not barred.

W. D. Collard in reply. The scheme of the Act would be quite unworkable if an action for damages could be brought during the continuance of the term, and where, as here, the construction of a statutory provision is doubtful, the court will favour a construction which was clearly intended and which makes the Act workable. Further, if an action could be brought during the term, it would be extremely difficult for a judge to assess the damage to the reversion caused by a breach of covenant when, by virtue of the Act, the termination of the tenancy has become wholly indefinite.

Gulliver v. *Catt*[8] is not in point and Slade J. was right in distinguishing it. Reliance has been placed on statements in that case which were merely obiter and were not intended to form part of the ground of the decision. Nothing was said there as to the effect of proviso (*a*) to subsection (3), nor as to whether the claim was premature; it was not necessary to deal with those matters because the claim was caught by the transitional provisions.

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[7] [1923] 2 K.B. 865, 878.

[8] [1952] 2 Q.B. 308.

Although section 57 prevents a claim for damages from being brought during the term, damages can be given during the term as a condition of granting relief from forfeiture, for there is nothing in the Act which affects the landlord's right to forfeit. But there is no power in the Act to grant damages simpliciter. The landlord is not without remedy for, even if the contract does not reserve a power of re-entry, he can invoke the statutory power of section 5 to have one written in. The mere postponement of the right to claim damages is not, I submit, a very great hardship on a landlord.

This claim comes within the proviso to subsection (3) of section 57. That provision is not dealing with matters springing into existence for the first time at the end of the tenancy, but with previously existing grounds of claim which the statute makes enforceable only at the end of the tenancy. The landlord's right to sue is postponed (whether it is taken away is not in point here). The vital matter is whether the claim is premature and not whether the ultimate remedy will be by action or arbitration.

Cur. adv. vult.

December 17. The following judgments were read:—

SINGLETON L.J. [after stating the facts]: The claim put forward by Mr. Collard, on behalf of the tenants, was a bold one. It was that the lessor of an agricultural holding could not recover damages during the tenancy for breach of any of the covenants embraced in his claim, but he must wait until the termination of the tenancy, and his compensation must then be determined in accordance with the provisions of the Act of 1948. The lessor had, he said, other remedies open to him, such as an injunction or forfeiture, but he could not recover damages. True, the lessor might be given damages under section 146 of the Law of Property Act, 1925, but that was not strictly awarding damages to him but granting relief to the lessee at the lessee's request.

I would have thought that if the rights of one party to a contract were to be so seriously affected as Mr. Collard claims, the Act of 1948 would have said so in plain terms. It would have been easy to say that, from the date on which the Act came into force, no landlord of an agricultural holding should have any right of action for damages for breach of any covenant contained in the lease or tenancy agreement, and that any claim, whenever it arose, should be postponed until the termination of the tenancy. There is no such provision in the Act, either generally or in relation to covenants which cover questions of husbandry. In the absence of clear words a party ought not to be deprived of his rights: see the words of Scrutton L.J. in *In re Arden and Rutter.*[1]

Section 101 of the Act preserves the rights and remedies of landlord and tenant subject to the provisions of section 11 (2) and section 70 (2), and " to any other provision of this Act which "otherwise expressly provides." Now, under section 11 (2) the landlord may obtain an injunction and has a right to recover damages on the tenant's quitting the holding, " but no other "remedy," from which it would appear that in cases within that subsection the right to recover damages is preserved, but is postponed. Section 70 is concerned only with the settlement of claims on termination of the tenancy. It was not suggested that that section covered this case. Mr. Collard submitted that section 57 was brought in by the words in section 101, " any other "provision of this Act which otherwise expressly provides."

Section 57 deals with compensation recoverable by a landlord. The time at which the right (if any) arises is on the tenant's quitting the holding on the termination of the tenancy. Subsection (2) deals with the amount of compensation, which is to be the cost, at the date of the tenant's quitting the holding, of making good the dilapidation, deterioration or damage. Subsection (3) provides that the landlord may claim compensation in respect of what might be described as damages for breach of agreement instead of claiming compensation under subsection (1), but he cannot claim both. It is proviso (*a*) of subsection (3) which gives rise to some difficulty—" So however that—(*a*) com"pensation shall be so claimed only on the tenant's quitting the "holding on the termination of the tenancy."

It was submitted on behalf of the tenants that section 57 (3) is a provision of the Act which provides for compensation within the meaning of section 65, and that, consequently, the landlord has no longer any right to damages, but can only claim compensation, and that his claim is postponed to the time at which the tenants quit the holding on the termination of the tenancy.

Section 57 is so framed as to deal with the landlord's claim to compensation "on the termination of tenancy," and the measure of compensation is based on the position as at the date of the tenant's quitting the holding. A wholly different position arises if there are breaches of covenants in the early stages of a long lease. Even if it can be said that the landlord may await the end of the lease and then claim compensation under section 57 (3), there is no reason why he should do so. Section 65 only bars an action for damages in a case for which the provisions of the Act provide compensation. If the landlord adopted the procedure under section 57 (3) in respect of damage for breaches of covenants, compensation (if any) would arise by reason of the landlord exercising the option so to frame his claim. Unless he does so there is no provision for compensation.

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[1] [1923] 2 K.B. 865, 878.

The view which I take is that subsection (3) gives the landlord an option. He may be content with compensation under subsection (1) *or* he may claim (in respect of matters specified) under a written contract of tenancy. If he is content with subsection (1) his right to recover arises on the tenant's quitting the holding on the termination of the tenancy. If he wishes to claim under subsection (3) it might be said that there is no certainty as to when the claim arises, or can be made, apart from (*a*). In other words, he might put forward his claim under the agreement before the termination of the tenancy in lieu of the claim he might have made under subsection (1) on the termination of the tenancy. The introduction of (*a*) makes it clear that under either subsection (1) or subsection (3) the claim is postponed.

There is nothing in section 57 which compels a landlord who has a right of action for damages for breaches of covenant in a lease or in a tenancy agreement to resort to arbitration if the breaches of covenant and the right of action arise during the tenancy. Prima facie, he has a right of action in the courts when the breach takes place. It is common ground that he might have a right to an injunction, but it is said on behalf of the tenants that by reason of section 57 he cannot recover damages in an action in which he is granted an injunction. I do not agree. I draw attention to the fact that this action in which forfeiture and damages were claimed was commenced on May 11, 1951, whereas the tenancy continues until March, 1953.

The effect of section 65 is to provide that neither tenant nor landlord can have any other remedy than compensation under the Act in any case for which the provisions of the Act provide for compensation, and it avoids any agreement to the contrary. It does not appear to me to have any bearing on this appeal unless it can be said that section 57 provides compensation for the breaches of which the landlord complains, breaches which, on the findings of Slade J., arose long before the termination of the tenancy. I have expressed my opinion that the landlord's claim did not arise under section 57, and certainly he has not exercised the option given to him by subsection (3) of that section. If the legislature had thought fit it would have been simple to say that there should be no right to recover damages for breach of covenant in any tenancy agreement in relation to an agricultural holding, but that any such claim should be treated as a claim to compensation (and should be postponed until the termination of the tenancy).

Mr. Collard referred to the decision of this court in *Gulliver* v. *Catt*,[2] and he drew attention to the fact that in the course of my judgment[3] I described the words in section 57 "on the "tenant's quitting the holding on the termination of the "tenancy" as a different proposition from "on . . . the termi-"nation of the tenancy" in section 70. In that case I was endeavouring to show the absurdity of the position taken up by the tenants, who were still in occupation and who sought to say that they could defeat the landlord's claim to bring an action in the courts by reason of section 57. In fact the tenants (Catt and another) remained in possession until two days before the hearing in the Court of Appeal in March, 1952, though the notice to quit had expired at Michaelmas, 1949, and Barry J. had held that the notice to quit was a good notice. At the same time I should say that I see the force of Mr. Collard's submission, and it may well be that the words "on the tenant's quitting the holding" in section 57 (1) are inserted to cover a case in which there have been several tenancies by the same tenant of the same holding, and to show that the right to compensation does not arise when one tenancy ends and another begins, but only when the tenant quits the holding on the termination of the last of them. As Mr. Collard pointed out, it is only by so reading those words that compensation recoverable under section 57 would fall to be dealt with by arbitration under section 70.

In my opinion, the judgment of Slade J. on the preliminary point was right, and this appeal should be dismissed.

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[2] [1952] 2 Q.B. 308.

[3] Ibid. 313.

BIRKETT L.J. This appeal raises a point of some importance to landlords and tenants in view of the submissions made on behalf of the tenants in this case. The claim made before Slade J. was for a forfeiture of the lease and damages for breaches of specified covenants. The defendants by their counterclaim asked for relief from the forfeiture under subsection (2) of section 146 of the Law of Property Act, 1925. All the requirements of that Act had been fulfilled by the plaintiff in these proceedings. Slade J. refused to grant the claim for forfeiture, but awarded a sum for damages for breaches of the covenants in the lease between the parties.

The substantial point raised before Slade J. on behalf of the defendants, and the only point raised in this appeal, was that, since the Agricultural Holdings Act of 1948, it was no longer possible to claim damages for breach of covenant such as were claimed in this action during the continuance of the tenancy, but any such claim must be brought upon the quitting of the holding at the termination of the tenancy, and not otherwise, because of the provisions of section 57 of the Act of 1948.

Mr. Collard argued that, revolutionary as his submission on behalf of the tenants might sound, it was none the less the design and the premeditated policy of the Act of 1948 that the jurisdiction of the Queen's courts should give way to the scheme which he said was embodied in the Act, and that claims for damages must be deferred until the quitting of the holding on the termination of the tenancy; and that compensation should then be awarded under the Act. He discussed various sections of the Act with some fullness to support the submissions he made. It was, of course, a considerable weakness in the argument that he was not able to quote any clear and direct language in the Act itself to support his submission, but had perforce to rely upon the inferences which he said might be drawn from certain of the sections; and he was thus confronted by the difficulty that if well-established rights of access to the courts were being taken away, it had always been held that the language authorizing this deprivation must necessarily be clear and direct in its terms. The sections of the Act of 1948 which were relied upon have already been subjected to close analysis in the judgment of my Lord, and it is not necessary to repeat the process.

The real point in this appeal is: what is the construction to be put on section 57 of the Act of 1948? I am not insensible to the attraction of Mr. Collard's argument, and to certain

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difficulties of construction which arise upon an examination of the language used in section 57. The Act of 1948 was no doubt designed to make an effective working code for landlords and tenants, and to simplify much of the procedure. It was because of this purpose that Mr. Collard was able to argue, for example, that the combined effect of sections 65, 101 and 57, was to take away from the landlord the right he formerly enjoyed of proceeding by way of an action for damages, and to substitute the award of compensation referred to in section 57. These sections have already been discussed, but it is clear that section 65 only limits the rights of the landlord or tenant where other provisions of the Act provide a specific remedy, and the general effect of section 101 is the same.

It therefore becomes essential to Mr. Collard's argument that he should be able to show that section 57 does provide the specific remedy so that sections 65 and 101 apply. In my opinion, this is where the argument breaks down. It is perfectly true that section 57 makes elaborate provisions for compensation, but, in my view, it only does so in well-defined circumstances. Subsection (3) permits the landlord to claim compensation in respect of matters specified in subsection (1) under and in accordance with a written contract of tenancy, instead of claiming compensation under subsection (1) itself. I interpret this to mean that when the tenant quits the holding on the termination of the tenancy, the landlord may elect to proceed under subsection (1) or subsection (3), but not both; and the compensation is to be for such matters as arise on the quitting of the holding at the termination of the tenancy. But neither expressly nor by implication is it said that the procedure laid down in section 57 is to prohibit the landlord from proceeding against the tenant at any other time for breaches of covenant committed during the continuance of the term. Indeed, I am not sure that the very action which was heard by Slade J. does not supply in some measure the answer to Mr. Collard's submission. If the judge had thought it right to decree a forfeiture, Mr. Collard does not dispute that he might also have granted relief to the defendants under subsection (2) of section 146 of the Law of Property Act, 1925. These terms include the word "damages." I think that the whole difficulty has arisen because of the wording—" so however that (*a*) compensation shall be so " claimed only on the tenant's quitting the holding on the " termination of the tenancy "; but I do not think that the use of the word " only " in that context means that a landlord may not bring an action for damages during the continuance of the tenancy; it means that for claims arising on the quitting of the holding on the termination of the tenancy the landlord, whether proceeding under either of the subsections in respect of that claim, must make his claim at that time and no other.

In my opinion, Slade J. decided the preliminary point correctly, and this appeal ought to be dismissed.

MORRIS L.J. [having stated the facts]: The submission of the defendants calls for an examination of the provisions of section 57 of the Act. In considering their effect regard must be had to their setting within the scheme of the Act. The defendants contend that damages may not be awarded for any breaches of covenant which can be related to certain wording in section 57 (1), that is, the wording "dilapidation or deterioration of, or "damage to, any part of the holding or anything in or on the "holding," save on the tenant's quitting the holding on the termination of the tenancy. It might seem strange if such an important statutory modification of contracts should be introduced into the law merely by way of an ancillary stipulation to a provision giving compensation to landlords where particular parts of an agricultural holding have deteriorated through bad husbandry. If, however, the words used lead to this result, they must be given their full and due significance.

It is not suggested, however, that other remedies for breaches of contract are to have a similar quiescence enforced upon them. Thus, it is said that there is nothing to prevent a claim for a forfeiture. It is said that if there is a claim for a forfeiture and damages, and if the court decides not to order forfeiture, that then the claim for damages cannot be pursued. Yet it is said that section 146 of the Law of Property Act, 1925, is unaffected. Nor is it said that in a forfeiture action is the right of the court to give relief in any way affected by section 57 of the Agricultural Holdings Act. Indeed, in the present case the defendants counterclaimed for relief from forfeiture on such terms as the court should think fit. The powers of the court under subsection (2) of section 146 of the Law of Property Act, 1925, are to give relief "on such terms, if any, as to costs, expenses, damages, "compensation, penalty, or otherwise, including the granting of "an injunction to restrain any like breach in the future, as the "court, in the circumstances of each case, thinks fit." Further, it is not said that the powers of the court in regard to the granting of injunctions are in any way affected.

The position is, therefore, that the defendants submit that, though in the present claim, if the claim for forfeiture had been established, the court might have required the defendants to pay compensation as a condition of having relief, and though, if forfeiture had been decreed, damages could have been awarded, yet though breaches of covenant were proved, inasmuch as a "reasonable time" had not elapsed between the notice under section 146 and the issue of the writ, with the result that the claim for forfeiture was not established, no damages for the proved breaches of covenant could be awarded. It is to be noted that no question arises in this appeal as to the measure of the damages awarded or as to the method or basis adopted in assessing them.

In my judgment, section 57 (3) of the Agricultural Holdings Act, 1948, does not have the effect which the defendants suggest, that is, of taking away from the plaintiff all his rights to claim damages during the tenancy for breaches of covenant. The subsection has a more limited application. If the construction of the subsection admits of doubt, regard must be had to the principle that a statute is not to be so construed as to take away legal rights unless it is clear that such was its intention. This principle is referred to by Lord Sterndale M.R. in *In re Arden and Rutter*.[4]

It is important to have in mind the general framework of the Act and of the part of it where section 57 is found. Section 34 provides for compensation to a tenant for disturbance. Sections 35 to 55 relate to compensation to a tenant, on the termination of a tenancy, for improvements. Section 56 gives a right to compensation to a tenant on the termination of a tenancy where there has been continuous adoption of a special system of farming. Section 57 provides for compensation to a landlord on the termination of a tenancy for deterioration of particular parts of a holding. Section 58 provides for compensation to a landlord on the termination of a tenancy for general deterioration of the holding.

Before dealing more specifically with the provisions of section 57 it is helpful, for the purposes of the present case, to have in mind the relevant covenants in the lease. They are as follows: "(3) To keep the erections and buildings on the land and the "boundary wall and fences thereof and all future erections in "good and in tenantable repair except that the repairs to the "said three greenhouses shall be limited to keeping the same

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[4] [1923] 2 K.B. 865, 872.

"wind and water tight . . . (5) to use the said demised land "as a nursery and for no other purpose . . . (7) to keep the "boiler repaired and working during the months of October to "April, both months inclusive . . . (8) to keep in good order, "topped, lopped, pruned and trained all fruit trees bushes and "shrubs . . . (9) to allow the landlord his agents or others at "any time to enter the buildings or erections standing on the "land to inspect the condition of the same and to comply with "any notice to repair within two months of the service of such "notice."

The complaints made in the action relate to breaches of some only of these covenants. Paragraph 2 of the amended statement of claim is as follows: "By the terms of the said lease "the said lessees jointly and severally covenanted with the said "landlord to keep the erection and buildings on the land and "the boundary wall and fences thereof and all future erections "in good and tenantable repair (damage by accidental fire "excepted) except that the repairs to the said three greenhouses "should be limited to keeping the same wind and water-tight, "to use the said demised land as a nursery, to keep the boiler "repaired and working during the months of October to April "both months inclusive, to keep in good order topped lopped "pruned and trained all fruit trees bushes and shrubs and not "without the previous consent of the landlord to cut down any "fruit trees or other trees provided that such consent should "not be withheld if the lessees should plant a new fruit or other "tree for each one cut down or removed and to comply with any "notice to repair within two months of the service of such "notice."

Section 57 (3) enables a landlord "in lieu of claiming "compensation under subsection (1)" to claim compensation "in respect of matters specified therein" under, and in accordance with, a written contract of tenancy. The "matters "specified therein" are, in my judgment, "the dilapidation "or deterioration of, or damage to, any part of the holding or "anything in or on the holding"; such matters must be viewed and assessed in relation to the time when a tenant quits a holding on the termination of a tenancy. It is important to note the words "in lieu of." The claim which may be made under subsection (3) is in lieu of the claim which may be made under subsection (1). The claim which may be made under subsection (1) relates to the time when the tenant quits on the termination of a tenancy, and relates also to the condition of parts of the holding at such time. The reasonable interpretation is that both subsections are dealing with the same matters and the same time. When the tenant quits a holding on the termination of his tenancy the landlord may either claim the compensation given to him by statute, that is, under subsection (1) for deterioration, or dilapidation, or damage to parts of the holding resulting from bad husbandry, or the landlord may elect (if the written contract of tenancy avails him) to claim compensation for deterioration, or dilapidation, or damage to parts of the holding resulting from breaches of contract. But the right of the landlord to sue for damages for breaches of contract at any other time is not affected.

If there were a long lease containing covenants to keep in repair, and covenants to yield up in repair at the end of the period, a claim for damages during the early period of the lease for a failure to keep in repair, assuming that damages on a recoverable basis could be proved, would not be directly related to any possible claim at a much later date which might, or might not, arise according as the premises were not, or were, yielded up in repair. So, also, when considering section 57, it would be unnatural to regard some claim during a tenancy for some breach of covenant as being "in lieu of" some claim which could only be considered or decided upon when the date of quitting on termination were known, and when the state of the premises at such time could be ascertained.

[His Lordship read section 65 and continued:] If subsection (3) of section 57 had not been enacted, it might have been considered that, on a tenant's quitting a holding on the termination of a tenancy, only the statutory compensation could be claimed. In my judgment, the effect of subsection (3) is to give to a landlord at such time the right to rely upon his contractual rights if he so chooses. But the landlord cannot have both the statutory compensation and compensation according to the terms of his contract. That is made clear by provision (*b*). The purpose of provision (*a*) is less clear. The words are: "Compensation shall be so claimed only on "the tenant's quitting the holding on the termination of the "tenancy." The meaning of this is, in my judgment, that a claim under a contract referable to the state of any part of the holding at the time when the tenant quits on termination must only be brought at such time, that is, at the time when a claim for statutory compensation could be made. But this leaves unaffected any claims under contract referable to the state of any part of the building at any other time. It might be said that provision (*a*) was not, on this basis, a provision that need have been inserted, for a claim referable to the condition at the time of quitting on termination would not normally be presented until after such time. There is force in this, but, nevertheless, in my judgment, the effect of provision (*a*) is to make it plain that the alternatives (that is, either to claim statutory compensation in regard to the state of parts of the holding at the time of quitting due to bad husbandry, or to claim compensation under the terms of a contract in regard to the state of the holding at the time of quitting) must arise at the same time; that time would be when the tenant quitted on termination. The words of proviso (*a*) are not apt to effect a fundamental variation of contracts. It would be singular if a somewhat far-reaching change in the law were enacted in so indirect a manner. If the interpretation of the proviso is not clear, then the intention to take away legal rights is not established.

In considering the problem which arises in this case I do not find any direct assistance in section 65 of the Act. That section opens with the words "Save as expressly provided in "this Act." Nor do I derive assistance from section 101 of the Act, which is made subject to other provisions in the Act. Nor can any clear conclusion result from bearing in mind that in legislation dealing with the user of agricultural land there are provisions by which security of tenure is given to the tenant, and others by which protection is in various ways given to him. The problem has ultimately to be solved by considering the wording of section 57. For the reasons which I have set out, I do not consider that the provisions of section 57 are a bar to the successful presentation by the plaintiff of the claims which he put forward.

I therefore consider that Slade J. was not debarred from awarding damages.

Appeal dismissed.

Solicitors: *Rose, Johnson & Hicks; Woodroffes.*

E. D.

1953
Jan. 23.

Lord Goddard C.J., Croom-Johnson and Pearson JJ.

REGINA *v.* WIMBLEDON JUSTICES. *Ex parte* DERWENT.

Building—Licence—Controlled rent—Rent in excess of permitted rent—Offence complete on granting of lease—Limitation of six months applicable—Prohibition—Building Materials and Housing Act, 1945 (9 *&* 10 *Geo.* 6, *c.* 20), *s.* 7 (1)—*Summary Jurisdiction Act,* 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11.

Where a house has been constructed under the authority of a licence granted by a local authority in accordance with the provisions of the Building Materials and Housing Act, 1945, and that licence is granted subject to a condition limiting the rent at which the house may be let, the summary offence of letting the house at a rent in excess of the permitted rent created by section 7 (1) of the Act is completed when the lease is granted and is not a continuing offence during the currency of the lease. Accordingly, as the Act of 1945 contains no provision which limits the time within which proceedings in respect of the offence must be taken, the provisions of section 11 of the Summary Jurisdiction Act, 1848, apply, and a court of summary jurisdiction has, therefore, no power to hear an information preferred more than six months after the date of the letting.

Stray v. *Docker* [1944] K.B. 351; 60 T.L.R. 198; [1944] 1 All E.R. 367 distinguished.

APPLICATION for order of prohibition.

On June 12, 1952, seven informations were preferred against the applicant, Sidney Derwent, a builder, charging him with offences under section 7 (1) of the Building Materials and Housing Act, 1945,[1] as amended by section 43 of the Housing Act, 1949. The first information alleged that the defendant, on April 27,

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[1] Building Materials and Housing Act, 1945, s. 7 (1): "Where a house "has been constructed under the "authority of a licence granted for "the purposes of a Defence Regulation "(hereinafter referred to as 'a build-"'ing licence') and the licence . . . "has been granted subject to any "condition limiting the price for "which the house may be sold or the "rent at which it may be let, any "person who, during the period of "four years beginning with the pass-"ing of this Act, sells or offers to sell "the house for a greater price than "the price so limited (hereinafter re-"ferred to as 'the permitted price'), "or, as the case may be, lets or offers "to let the house at a rent in excess "of the rent so limited (hereinafter "referred to as 'the permitted rent'), "shall be liable on summary convic-"tion to a fine not exceeding the "aggregate of—(*a*) such amount as "will in the opinion of the court secure "that he derives no benefit from the "offence; and (*b*) the further amount "of one hundred pounds; or to im-"prisonment for a term not exceeding "three months, or to both such fine "and such imprisonment."

By the Housing Act, 1949, s. 43, the period of four years in the above section is extended to eight years.

1950, did "unlawfully let a house known as 5 Church Hill, "Wimbledon, for a term of seven years from March 25, 1950, at "a rent of £245 per annum exclusive of rates notwithstanding "that it was a condition of the building licence dated June 30, "1949, under which the said house was erected that the said "house should not be let at a rental in excess of £220 per annum "exclusive of rates, contrary to section 7 of the Building Materials "and Housing Act, 1945." The other six informations each alleged a similar offence in relation to other houses let by the applicant.

At the hearing before the justices on June 12, 1952, a preliminary objection was taken on behalf of the applicant that the justices had no jurisdiction to hear the charges since the informations had not been laid within six months from the time when the matter of the information, namely (in the case of the first information), the letting of the house on April 27, 1950, arose, as required by section 11 of the Summary Jurisdiction Act, 1848,[2] no time being specially limited by the Act of 1945 for the preferring of the information in question. The prosecution thereupon applied to the justices to amend that information by inserting in it after the words "at a rental in excess of £220 per annum exclusive "of rates" the words "and that the said house continued to be "and is still let at the said rent which is in excess of the rent so "limited," and that the others should be similarly amended. The justices allowed the amendments and held that they had jurisdiction to hear the informations as amended, but adjourned the hearing.

On the application of the defendant, the court granted him leave to apply for an order of prohibition against the justices on his submission that the offence created by section 7 (1) of the Building Materials and Housing Act, 1945, was complete at the date of the granting of the lease of which complaint was made and was not a continuing offence during the currency of the lease, and that, in consequence as the informations were not preferred within six months from the date of the letting, the justices had no jurisdiction to hear them.

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[2] Summary Jurisdiction Act, 1848, s. 11: "In all cases where no time is "already or shall hereafter be specially "limited for making any such complaint or laying any such information in the Act or Acts of Parliament "relating to each particular case, such "complaint shall be made and such "information shall be laid within six "calendar months from the time when "the matter of such complaint or "information respectively arose."

M. R. Nicholas for the applicant. The justices were wrong in allowing the amendment to the information and prohibition should issue to prohibit them from hearing all the informations, to which the same considerations apply. To deal with the first information, it was laid on June 12, 1952, in respect of an offence alleged to have been committed on April 27, 1950, and was therefore clearly out of time, since by section 11 of the Summary Jurisdiction Act, 1848, when no time is specially limited for laying an information, it must be laid within six months of the time when the matter of the information arose.

[LORD GODDARD C.J. The question is whether the offence committed on April 27, 1950, was a continuing offence.]

It is submitted that clearly it was not. Section 9 (3) (*b*) of the Act says that " a person lets a house if he demises the house or " agrees to demise it "; and the moment of time to be considered is when the owner conveys or agrees to let the house to a tenant. That is the ordinary and natural meaning of the words in the section, and there is nothing in the Act which makes it possible to read into section 7 (1) any such words as are suggested in the amendment made by the justices. All the sections of the Act which bear on the point suggest that the letting of a house is something that has taken place at a definite time in the past: see sections 7 (2) (4) (5) (6), 8 (1) and 9 (4). In the present cases the justices have expressed their intention of resuming the hearings of the informations at a later date. If the argument for the applicant on the construction of section 7 (1) is right, he would be entitled to an order of certiorari to bring up and quash any case in which the justices decided against him on the basis of the amendment, and where certiorari will lie prohibition will also lie. The attention of the justices was called to three cases, *Stray* v. *Docker*,[3] *Norman* v. *Simpson*[4] and *Duplex Settled Investment Trust Ld.* v. *Worthing Borough Council*,[5] but it is submitted that none of those cases is any authority which justifies the strained construction which the justices put on the words of section 7 (1).

Assuming that the question in this case goes to the jurisdiction of the justices, then prohibition should issue. In *The King* v. *Electricity Commissioners*[6] Atkin L.J. said: "I can see no " difference in principle between certiorari and prohibition, except

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[3] [1944] K.B. 351; 60 T.L.R. 198; [1944] 1 All E.R. 367.

[4] [1946] K.B. 158; 62 T.L.R. 113; [1946] 1 All E.R. 74.

[5] [1952] 1 All E.R. 545.

[6] [1924] 1 K.B. 171, 206; 39 T.L.R. 715.

"that the latter may be invoked at an earlier stage. If the "proceedings establish that the body complained of is exceeding "its jurisdiction by entertaining matters which would result in "its final decision being subject to being brought up and quashed "on certiorari, I think that prohibition will lie to restrain it from "so exceeding its jurisdiction." In the present case the jurisdiction of the justices was confined to trying a case in which the information was laid within six months of the offence being committed and the court are invited to say that there was no continuing offence, and that in the case of each of the seven informations prohibition should issue.

Eric Sachs Q.C. and *J. L. Elson Rees* for the respondents. It is submitted (1) that the matter here is not one for prohibition; (2) that if it were, then in the court's discretion, as the case is one which could be dealt with by way of appeal from the justices, it is not a case in which prohibition should be ordered; and (3) that the offence was a continuing one and that consequently the justices had jurisdiction to entertain the information at the time when it was preferred.

[Lord Goddard C.J. The court would like to hear argument on the question whether there was a continuing offence.]

It is submitted that there was. The preamble to the Act of 1945 says that its object, inter alia, was to make provision for limiting the price at which certain houses may be sold or let. The duty of being the watch dog with regard to the price at which a house, built under a licence and subject to a condition as to price, may be sold or let is given to the local authority by section 8 (2) and the authority is under a duty to take measures within its area for enforcing the provisions of the Act. The authority can only take steps to enforce the Act when it has discovered that a breach has been committed. If the transaction is a sale, it is conceded that when once the sale has taken place on a particular day, that is an end of the matter and the offence has been committed. What Parliament was aiming at was the receipt of money or other benefits in excess of the condition limiting the selling price or the rent either by the landlord or an assignee. That would be consistent with there being an offence committed when the rent was received and it would be a continuing offence during the currency of the lease. In the case of rent it is submitted that it would be impossible to hold that the offence was only to be the subject of remedy under the Act if it were discovered within six months of the granting of the lease.

1953

REGINA
v.
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JUSTICES.
Ex parte
DERWENT.

[LORD GODDARD C.J. If "sells or offers to sell" in section 7 (1) relates to one definite act, why should not "lets or offers to "let" also relate to one particular act?]

If it were so held, it would mean that a person who let at a non-permitted rent would get away with the offence if he were not prosecuted within six months. In *Stray* v. *Docker*,[7] which was concerned with letting a furnished house at an extortionate rent contrary to section 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, it was held that the six months' limitation prescribed in section 11 of the Summary Jurisdiction Act, 1848, ran from the last quarter day on which the rent was payable and not from the date of the letting, and consequently that there was an offence on every quarter day. It is submitted that that decision is an authority in the present case and that the justices were right in allowing the amendment.

[On the question of prohibition they also cited *Rex* v. *North, Ex parte Oakey*[8] and *Reg.* v. *Judge of Greenwich County Court.*[9]]

LORD GODDARD C.J. The applicant in these seven cases moves for orders of prohibition to justices for the county of Surrey sitting at the petty sessional division of Wimbledon, to prohibit them from continuing to hear the seven summonses in question which allege offences against the Building Materials and Housing Act, 1945.

Despite a very strenuous and clear argument by Mr. Sachs, I am of opinion that this is an extremely simple case, though it may be that, owing to the way in which the Act of 1945 is drafted, a considerable difficulty is thrown in the way of local authorities in enforcing its provisions. We are not concerned with that because, although in construing an Act of Parliament the court must always try to give effect to the intention of the Act and must look not only at the remedy provided but also at the mischief aimed at, it cannot add words to a statute or read words into it which are not there, and, if the statute has created a specific offence, it is not for this court to find other offences which do not appear in the statute.

The case is one which seems to me to involve a very simple question of construction. By the Building Materials and Housing Act, 1945, it was provided that a person might obtain a licence from the local authority enabling him to build a house and that, if he did get such a licence, the local authority could impose as a term, that if he sold or let it, he should not do so at a figure above that which they had fixed. Provisions are made in the Act for the registration of the conditions imposed so that they became land charges. Therefore, there is no hardship involved because, if an intending tenant or an intending purchaser desires to buy or to rent one of these houses, his solicitor can search the register of charges and will see in it the conditions which have been imposed, and will then know whether the purchase price or the rent he is being charged is or is not in accordance with the licence which has been granted.

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[7] [1944] K.B. 351.

[8] [1927] 1 K.B. 491; 43 T.L.R. 60.

[9] (1888) 5 T.L.R. 74; 60 L.T. 248; 37 W.R. 132.

We have naturally not gone into the merits of these cases, and we know nothing about them; we are deciding on the question of jurisdiction. The difficulty in the way of the local authority in this case, and it is a real difficulty, is that the offence of letting or selling a house above the licensed price is made a summary offence and a summary offence only. It is elementary learning that summary jurisdiction is entirely a creation of statute, and a bench of justices can only sit as a court of summary jurisdiction in accordance with the statute which enables them to decide a case in summary manner, and then their proceedings are governed by the Summary Jurisdiction Acts. Section 11 of the Summary Jurisdiction Act, 1848, provides: "In all cases where no time "is already or shall hereafter be specially limited for making "any such complaint or laying any such information in the Act or "Acts of Parliament relating to each particular case, such com- "plaint shall be made and such information shall be laid within "six calendar months from the time when the matter of such "complaint or information respectively arose."

It would seem to be perfectly clear from that section that if in a case brought before justices it can be seen on the face of the proceedings that the offence is alleged to have been committed more than six months before the information was laid, justices have no power to enter upon the case at all, because they have no jurisdiction to sit as a court of summary jurisdiction in the case of an offence alleged to have been committed more than six months before the proceedings were instituted. That is why from time to time, in a case which may be dealt with as an indictable or a summary offence, if, for instance, the offence has been committed more than six months before it is discovered, the prosecution treat the case as an indictable and not a summary offence. Take a very simple case and suppose that there is a charge of dangerous driving contrary to section 11 of the Road Traffic Act, 1930. That can be treated either as a summary offence or as an indictable offence. If, because the defendant cannot be found, or something of that kind, no proceedings are taken until seven months after the offence is alleged to have been committed, the prosecution can put forward the case as an indictable offence. It cannot be treated as a summary offence and justices cannot deal with it as a court of summary jurisdiction but only as examining justices.

What we have to consider, therefore, is whether in each case the offence laid here did take place more than six months before the information was laid. In the information in the first case before us, it was said that on April 27, 1950, the defendant "did unlawfully let a house known as 5, Church Hill, Wimbledon, for a term of seven years from March 25, 1950, at a rent "of £245 per annum exclusive of rates notwithstanding that it "was a condition of the granting of the building licence dated "June 30, 1949, under which the said house was erected that "the said house should not be let at a rental in excess of £220 "per annum exclusive of rates, contrary to section 7 of the "Building Materials and Housing Act, 1945."

The point was taken before the justices that they could not enter on the hearing of the case because on the face of the information it was stated that the offence was committed more than six months ago. Thereupon, the prosecution, in order as they thought to enable jurisdiction to be given to the justices, asked them to amend the information, as of course they have power to do, by inserting, immediately after the words "at a rental in "excess of £220 per annum exclusive of rates," the words "and "that the said house continued to be and is still let at the said "rent which is in excess of the rent so limited."

The question which we have to decide is whether the proposed amendment discloses any offence under the Act. I need hardly say that there are many Acts of Parliament in which a certain act is constituted an offence, and it is provided that for every day that the act in question continues or remains unabated, as the case may be, it shall be a continuing offence, and a penalty is fixed for every day or week or month during which the state of affairs exists. There are no such words as those, and it is not contended that there are, in the statute which we are construing. The section which creates the offence is in these words: [His Lordship read section 7 (1) of the Act of 1945 and continued:] From the penalty imposed, it will be seen that the offence is regarded as being a fairly serious one. We are asked to say, as I understand it, that the words " lets or offers to let " are to be construed as meaning that an offence is committed during the whole time of the lease. In my opinion, such a construction is impossible. A person lets a house once and for all when he demises it by means of a lease. It is conceded that, if the case is one of a sale, the offence takes place once and for all when the house is sold—that is, when the conveyance is executed or even when the house is offered for sale. How can we give a different construction to the words " sells or offers to sell " from that to be given to " lets or " offers to let " ? It would be quite impossible. The words appear in the same section, and if we gave a construction such as we are asked to give here to the word " lets," we should have to give the same construction to the word " sells." It would then follow that if a person sold a house he might, years afterwards, or at any rate eight years afterwards, be prosecuted for an offence under the section. If Parliament had made this an indictable offence, it might very well be that a court of trial could try it, no matter when the offence was committed, because contra regem non occurrit tempus, unless there are specific words in the Act creating the offence which limit the time within which the proceedings must be taken. There are certain cases—for instance, the common case under the Criminal Law Amendment Act, 1885, s. 5—in which the offence must be prosecuted within 12 months, but unless there is a provision of that kind the court can try a case on indictment however long ago the offence was committed, but courts of summary jurisdiction cannot.

We are asked to say that Parliament must have assumed that a local authority might not at once be able to find out that an offence had been committed, and, therefore, that we ought to give some benevolent construction and turn something into an offence which the statute does not say is an offence. I think that it is much more probable that, as these rents and prices had to be registered and to be regarded as land charges open for inspection, Parliament assumed that intending lessees and intending purchasers or their solicitors would, or could, search the register of charges and find out if they were being over-charged, and if they found that they were, that they would take proceedings to protect themselves and would give information to the local authority. It seems to me that it would have been possible, though it would be putting a burden on local authorities, to have made it a condition of giving a licence, not only that the price or the rent should be so much, but that before the house was let or the sale completed the documents should be sent to the local authority so that they might see whether the transaction was within the terms of the licence. Whether or not it is desirable that the law should be amended in that way is not for this court to determine, and we cannot speculate on what Parliament may have had in mind, but we can find nothing in section 7 which enables us to construe the words "lets or offers to let" as creating a continuing offence for the purposes of the section, any more than, as admitted, we can construe "sells or offers to sell" as a continuing offence.

That, I think, is the short and conclusive answer to the question of construction which has been raised, and I do not think that any of the cases which have been cited to us really give any assistance. *Stray* v. *Docker*[1] was much relied on by Mr. Sachs, but that was a case under a different Act and under quite different words. In the present case the court has no doubt that on the true construction of section 7 each offence laid was committed once and for all when the house was demised, that is to say, when the lease was executed, which was (in the case of the first information) on April 27, 1950.

Next, Mr. Sachs argued that we ought not to deal with this case by way of prohibition. Earlier in my judgment I pointed out that the words of section 11 of the Summary Jurisdiction Act, 1848, limit the jurisdiction of justices by taking away their jurisdiction to adjudicate on any case where the offences have been committed more than six months before the information was laid. If the justices have no jurisdiction, this court is entitled and ought to issue prohibition to prevent them from going on with the case. The justices, most properly, adjourned the hearing in order that this point might be argued, so that if prohibition was refused they could continue the hearing of the case, but they will now be prohibited from going on. The present application is certainly the most convenient course to take to prevent a great deal of expense being incurred in hearing these seven summonses, and the defendant is entitled to the relief of prohibition because, if a court has no jurisdiction, no consent can give it jurisdiction. It ought not to embark upon the case at all.

I agree that the justices might, if this court were not asked to prohibit them from doing so, proceed to hear a case, and the point could then be taken before them that they had no jurisdiction to convict, and if they convicted application would be made for them to state a special case. The statutory provisions which provide for the stating of cases by justices enable cases to be stated on questions of jurisdiction, but there is not, on that account, any reason why, if the court is satisfied that there is a lack of jurisdiction in the justices, they should not issue prohibition. A writ of prohibition was framed with that object: it was the direction of a superior court to an inferior court to prevent the inferior court from acting without jurisdiction. The justices would be acting without jurisdiction if they convicted in this case, because the offence was committed more than six months before the date of the information. It is an entirely different case from some which come before this court, for instance, cases in relation to rent-fixing tribunals, in which, before the tribunal can say whether they have jurisdiction or not, they have to inquire into certain facts. In the well-known judgment of Lord Esher M.R. in *Reg.* v. *Commissioners for Special Purposes of the Income Tax*[2] he pointed out that it is legitimate when the jurisdiction of justices or inferior bodies depends upon the existence of certain facts, for them to inquire into those facts to find out whether they have jurisdiction or not, and this court would then review their finding of fact and, if it came to the conclusion that the facts were wrongly found, it would say that the justices acted without jurisdiction. But that is not the case here, because here the defect appears on the face of the proceedings. The first information, for example, clearly shows an offence which was committed once and for all on April 27, 1950, and it follows, therefore, that the justices had no jurisdiction to inquire into that offence when the information was not laid till June 12, 1952.

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[1] [1944] K.B. 351; 60 T.L.R. 198; [1944] 1 All E.R. 367.

The result is that an order of prohibition will go in all these cases.

CROOM-JOHNSON J., after referring to the facts continued: Perhaps it is worth just a passing observation that when justices are being invited to make an amendment which affects, or may affect, the liberty of the subject, and there are penal consequences of the gravity of those which are indicated in section 7, they should proceed, as I am sure they would normally proceed, with very great hesitation and with very great caution.

The argument for the respondents, an interesting one, is, in effect, that the proper construction of section 7 of the Building

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[2] (1888) 21 Q.B.D. 313, 319; 4 T.L.R. 636.

Materials and Housing Act, 1945, is that once a house has been let in contravention of the section, then at any time when money in respect of the excessively reserved rent is payable, the offence is still being committed. It is not a new offence, but a continuation of the original offence by the person who built the house and who is the landlord. The answer to that depends on the proper construction of section 7. That section contains provisions which deal not only with the limitation of the rent of houses constructed under certain building licences, but also with sales, and imposes a limitation on the purchase price of a house which has been constructed by a person who had a licence to build it.

[His Lordship read the relevant part of the section:] It is, therefore, noticeable that with regard to each of the two subject-matters, a sale or a lease, the legislature has provided that it shall be an offence either to sell or to offer to sell or to let or to offer to let.

It is suggested with regard to the words "lets or offers to let," that when once the house has been let and the term for which it is let is still continuing, in some way, which it is not easy to understand as a matter of first impression, the house is still being let or offered to be let. I should have had great difficulty in appreciating, as a matter of construction, how those words in a penal provision in a statute of this kind could achieve that result; and my difficulties are considerably increased when it is apparently admitted that when the words to be considered are the other words "sells or offers to sell," once the house has been sold, no such construction of those words by parity of reasoning is possible as that which is suggested with regard to the expression "lets or offers to let." I have read and re-read this part of section 7, and I have looked at the other sections which deal with certain other remedies which can be given, but I am quite unable to see how, by any canon of construction with which I am acquainted, it is possible to extract from these words in—as I have said already—a penal provision, a construction which enables the court to say that they include a continuing offence.

As a general rule, the court is not, I think, eager to find continuing offences created by a statute, and certainly not without express words which make clear that that was the intention of the legislature when the statute was passed. I cannot see anything here which indicates anything of the kind. It would have been so easy, as suggested by my Lord, to put in some provision to the effect that if an end was not put to the matter complained of, or if it was not put right, there should be deemed to be a continuing offence, and providing, for example, for a daily or weekly or monthly penalty. There is nothing of that kind here. Though I will not say that such provisions in statutes are common, they are well known. I think that the argument that there was a continuing offence, which has been advanced in this case to support the action of the justices, fails. The result is that the defect in each information, as it originally was, is not cured by the amendment which the justices have made. In other words, the justices should be stopped from going on with the hearing of the informations in the form in which they have permitted them to be amended.

Then it is said, as a sort of tabula in naufragio, that the remedy of prohibition is not one which it is open to this court to impose. I do not wish to add anything about that. I concur with my Lord's observations on that point, as I concur in his judgment as a whole.

PEARSON J. I agree, and will add a few words on the question of construction. I think that it is quite plain when one carefully considers all the provisions of section 7, together with the provisions in the interpretation section, section 9 (3) (*b*), that a " person " lets a house if he demises the house or agrees to demise it," and the offence under section 7 (1) of letting a house at a rent in excess of the permitted rent consists of, and is completed on, the execution of the lease or the conclusion of the agreement to let the house. That appears strongly, as has been pointed out, from the provisions of section 7 (1), and support for it can also be derived, as was pointed out by Mr. Nicholas, from the provisions of subsection (2) as to when a house shall be deemed to have been let at a rent in excess of the permitted rent, which of course implies that it is something which has already taken place at a moment of time. Then there is similar wording in subsection (4), referring to the rent at which the house was let, showing that it is a past event which has already occurred; and again, in subsection (5), the wording is: " In determining for the purposes of this section " the consideration for which a house has been sold or let." There, again, it is contemplated as a past event, already complete. Then there is an interesting instance in subsection (7) (*b*): " Where any person is convicted of the offence of letting a house " at a rent in excess of the permitted rent, the court may, if the " interest created by the letting has not expired at the time of the " conviction. . . ." I think that the language of that paragraph, as well as the language of the Act in general, is carefully chosen and

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REGINA v. WIMBLEDON JUSTICES. *Ex parte* DERWENT.

Pearson J.

is accurate language. It means that the letting is a demise which creates an interest forthwith. It is the interest which continues and the act of demise has already taken place.

I would say, finally, that I think that *Stray* v. *Docker*,[3] to which reference has been made, operates to confirm the view which this court has taken of the meaning of the Act in this case, because in that case both Humphreys J. and Asquith J. distinguished clearly between the two elements which, under section 10 (as amended) of the Rent Act of 1920, had to be fulfilled before it operated. Humphreys J. said[4]: "The section prescribes that "there must be a letting after a certain date, and it must "also be proved that the rent charged, which includes payment "in respect of the use of furniture, yields to the landlord a profit "which, having regard to all the circumstances of the case, is "extortionate. In my view, the real offence created by the "section is not the letting of the dwelling-house to which the Act "applies, although that must necessarily be an incident in the "commission of the offence, but the charging to the tenant of a "rent which in all the circumstances yields to the landlord an "extortionate profit." There is similar reasoning in the judgment of Asquith J.[5]

Having regard to those factors, I think that it is clear that there is only one possible answer to the question of construction, and that is the answer which has been given, and I concur in the order proposed.

Order of prohibition.

Solicitors: *Kenneth Brown, Baker, Baker; Edwin M. Neave.*

P. B. D.

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[3] [1944] K.B. 351.

[4] Ibid. 355.

[5] Ibid. 356–7.

1953
Jan. 21.

Lord Goddard C.J., Croom-Johnson and Pearson JJ.

CARD *v.* SALMON.

Justices—Procedure—Examining magistrates—No power to state a case —Summary Jurisdiction Act, 1879 (42 *&* 43 *Vict. c.* 49), *s.* 17.

Where a person charged with an offence which is triable summarily or on indictment has elected to go for trial by jury, the duty of the justices, under section 17 of the Summary Jurisdiction Act, 1879, is to treat the offence as an indictable one and accordingly

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

to sit as examining magistrates; as such they have no power to state a case for the consideration of the Divisional Court because they do not come to any decision in respect of the case, except to decide whether or not a prima facie case has been made out against the person charged.

CASE STATED by Devizes justices.

The defendant, Percy Joseph Card, was charged with dangerous driving contrary to section 11 of the Road Traffic Act, 1930. At the hearing before the justices the solicitor for the prosecution made an application under section 28 of the Criminal Justice Act, 1948, for the case to be tried summarily, which was granted. The defendant, on being asked whether he wished to be tried summarily or by jury, elected to be tried by jury. Before the justices had heard any evidence of the facts of the case the defendant's solicitor contended that the defendant had not received the necessary notice of the prosecutor's intention to prosecute required by section 21 of the Road Traffic Act, 1930. The justices considered that contention and purported to find that the prosecutor had complied with the provisions of the section.

The defendant appealed.

The case stated contained the facts relevant to the defendant's contention which are not material to the present decision.

Norman Skelhorn for the defendant. The point might arise as to whether the justices were entitled to state a case; however, the justices were sitting as a court of summary jurisdiction and so were entitled to state a case. There is a distinction between justices inquiring into a purely indictable offence where they are at no time anything but examining justices and a case where the accused has an option to elect. In an ordinary indictable offence the justices never have the jurisdiction emanating from the Summary Jurisdiction Acts but only from the Indictable Offences Act, 1848. However, where the accused, having a right to elect, elects to be tried by jury, the justices are dealing with a case where jurisdiction is derived originally from section 17 of the Summary Jurisdiction Act, 1879. The section in terms says that on his election the "court of summary jurisdiction" shall deal with the case as if the accused were charged with an indictable offence.

The definition of a court of summary jurisdiction in section 13

(11)[1] of the Interpretation Act, 1889, is very wide and taken literally would cover any justices doing anything, but must be limited to their performing functions appertaining to the Summary Jurisdiction Acts: *Boulter* v. *Kent Justices.*[2] Having derived their jurisdiction from those Acts, the justices were a court of summary jurisdiction within that definition and therefore they had jurisdiction to state a case on the preliminary point given by section 33 of the Act of 1879.

[LORD GODDARD C.J. Section 17 of the Act of 1879 turned the case from a summary one to an indictable one, after which the justices had no power to act and determine the case. Justices are only entitled to state a case because theirs is a final decision. The power to state a case is given by Summary Jurisdiction Act, 1857.]

There is a material difference in wording between section 2 of the Act of 1857 and section 33 of the Act of 1879. Section 33 does not depend on the court having power to determine the matter in a summary way. It comes back to the question whether the justices when determining the preliminary point were a court of summary jurisdiction.

Norman Brodbrick for the prosecutor was not called upon.

LORD GODDARD C.J. stated the facts, and continued: Once the defendant had claimed his right to go before a jury, the clear duty of the justices in accordance with the provisions of section 17 of the Summary Jurisdiction Act, 1879, was to sit as examining justices, and take the depositions.

Section 17 (1) of the Act provides: " A person when charged " before a court of summary jurisdiction with an offence, in " respect of the commission of which an offender is liable on " summary conviction to be imprisoned for a term exceeding " three months, and which is not an assault, may, if he appears " in person to answer the charge and before he pleads to the " charge but not afterwards, claim to be tried by a jury, and " thereupon the court of summary jurisdiction shall deal with " the case in all respects as if the accused were charged with

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[1] Interpretation Act, 1889, s. 13 (11): " The expression ' court of sum- " ' mary jurisdiction ' shall mean any " justice or justices of the peace, or " other magistrate, by whatever name " called, to whom jurisdiction is given " by, or who is authorized to act " under, the Summary Jurisdiction " Acts, whether in England, Wales, or " Ireland, and whether acting under " the Summary Jurisdiction Acts or " any of them, or under any other " Act, or by virtue of his commission, " or under the common law."

[2] [1897] A.C. 556; 13 T.L.R. 538.

"an indictable offence and not with an offence punishable on "summary conviction, and the offence (if not indictable other-"wise than by virtue of this section) shall as respects the person "so charged be deemed to be an indictable offence, and, if the "person so charged is committed for trial, or bailed to appear "for trial, shall be prosecuted accordingly. . . ."

There does not seem to be very much difficulty in understanding that section. Under the Road Traffic Act the offence of dangerous driving may be prosecuted summarily or on indictment, but as on summary conviction a defendant is liable to be sent to prison for four months, he can claim his right to be tried by a jury. In this case the defendant claimed that right whereupon the jurisdiction of the justices to hear and determine the case ceased, and they should thereafter have acted as examining justices under the Indictable Offences Act, 1848, and proceeded to take depositions.

As soon as the defendant had elected to be tried by a jury, his solicitor persuaded the justices to give a decision about the validity of the notice given to him of the intention to prosecute required by section 21 of the Road Traffic Act. The statute provides that the provisions of that section are to be deemed to have been carried out unless the contrary is proved, so that it would have been for the defendant to prove that they had not been carried out. That point ought never to have been taken before the justices because it was a point of defence which should have been open to the defendant on the trial for which he himself had elected. Of course, if, when the facts had been gone into, the justices had said: "No jury would convict because "we do not think the man was driving dangerously," that would have been another matter. Then, under the Indictable Offences Act they could have dismissed the charge on the ground that there was no prima facie case. But a point as to the validity of the notice is one partly of law and partly of fact which has to be decided by the court of trial.

The difficulty which confronts Mr. Skelhorn in this case is that examining justices have no power to state a case. A case can only be stated by justices sitting as a court of summary jurisdiction who as such have power to hear and determine a case, that is to say, to try the case, or by quarter sessions who can state a case by virtue of the commission. The reason is, of course, obvious. If a court of summary jurisdiction is trying a case, it may be confronted with some alleged point of law, sometimes a good one and very often a bad one. At any rate, it is submitted to the court and they want to know whether their decision upon it is in accordance with law. They do not, however, come to any final decision when they are sitting as examining justices; they only come to a conclusion whether or not a prima facie case has been made out to send for trial. They have power to state a case when they are sitting as a court of summary jurisdiction because their decision is conclusive, subject to appeal, and they are entitled to ask this court whether or not their decision is in accordance with law. The stating of a case, like any other form of appeal, is entirely a matter arising by statute, and once justices deal with the case as one that has to go for trial, they are sitting under the Indictable Offences Act, 1848, and not under the Summary Jurisdiction Act, 1879.

I have had some difficulty in following an argument which Mr. Skelhorn advanced under section 13 (11) of the Interpretation Act, 1889. I am quite sure that the Interpretation Act does not turn a court of examining justices into a court of summary jurisdiction. The justices in this case obtained their power to hear the case not from the Summary Jurisdiction Acts at all but under the Road Traffic Act, 1930. Under the Road Traffic Act it can be dealt with as an indictable offence or a summary offence, and at the election of the defence; it must be dealt with in the way desired by the defence. Therefore, section 17 of the Act of 1879 applies, which provides that once the election is exercised the offence becomes for all purposes an indictable one, so that the Indictable Offences Act, 1848, applies and not the Summary Jurisdiction Act, 1879. Accordingly, the justices had no power to state the case, and we dismiss the appeal.

CROOM-JOHNSON J. I agree, and have nothing to add.

PEARSON J. I agree.

Appeal dismissed.

Solicitors: *Darley, Cumberland & Co. for Wansbroughs, Robinson, Tayler & Taylor, Devizes; Taylor, Jelf & Co. for Wilson & Sons, Salisbury.*

STRUTT v. PANTER.

[Plaint No. H. 1061.]

C. A.

1953
Jan. 26.

Evershed M.R.,
Jenkins and
Morris L.JJ.

Landlord and Tenant—Rent restriction—Widow of statutory tenant succeeding to statutory tenancy—Order for possession on terms that widow granted alternative accommodation by landlord—Alternative accommodation occupied by widow until her death—Widow's daughter entitled to succeed as statutory tenant of alternative accommodation—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 12 (1) (*g*), 15.

The widow of a statutory tenant succeeded under section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to a statutory tenancy of No. 48 Station Road, Chertsey. By an order dated February 7, 1950, the widow was ordered to give up possession of No. 48 Station Road upon the terms that the landlord let to her No. 59 Station Road, which was also owned by him, at the same rent as she was paying for No. 48, which was less than the recoverable rent of No. 59. The widow took possession of No. 59 and lived there until her death on December 17, 1951. Her daughter claimed to succeed her as statutory tenant.

In these proceedings the landlord claimed possession of No. 59, contending that the effect of the order of February 7, 1950, was to transfer the statutory tenancy of No. 48 Station Road to No. 59 and that the statutory tenancy having devolved once under section 12 (1) (*g*) could not do so again. The county court judge dismissed the landlord's action. On appeal:—

Held, that a statutory tenancy could only come into existence in accordance with the language of section 15 of the Act of 1920 because a contractual tenant retained possession of the subject-matter of the tenancy after the contractual tenancy had determined; that it was impossible to create a statutory tenancy where no previous relationship of landlord and tenant had ever existed in respect of the premises; that the effect of the order of February 7, 1950, was to bring into existence a new contractual tenancy between the landlord and the widow; and that, accordingly, no order for possession could now be made against her daughter.

Semble, that the landlord could immediately after the order of February 7, 1950, had been made have determined the contractual tenancy of No. 59 as a preliminary to increasing the rent to the full recoverable rent; and, if this is to be prevented, an order of this kind should contain a further undertaking by the landlord that so long as the tenant remained in occupation and complied with all the terms of the newly created tenancy the landlord would not serve a notice determining the contractual tenancy with a view to an increase of rent without the leave of the court.

APPEAL from Judge Hodgson sitting at Kingston-on-Thames county court.

C. A.
1953

STRUTT
v.
PANTER.

A Mrs. Beard succeeded her husband, under the provisions of section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as statutory tenant of No. 48 Station Road, Chertsey. The weekly rent in 1950 was 10s. 11d. On February 7, 1950, Judge Konstam made an order for possession against her of those premises on the terms that the landlord, Cecil Baden Strutt, would let to Mrs. Beard No. 59 Station Road, which was also owned by him, at the same weekly rent of 10s. 11d. The recoverable weekly rent of No. 59 Station Road, which was also subject to the Rent Acts, was 13s. 10d. at the date of that order. Mrs. Beard took possession of No. 59 Station Road and lived there until her death on December 17, 1951.

The landlord brought proceedings for possession of No. 59 Station Road against Mrs. Joan Panter, Mrs. Beard's daughter, who had remained in occupation. She claimed to be entitled to remain in possession as statutory tenant by virtue of the provisions of section 12 (1) (*g*) of the Act of 1920. The county court judge dismissed the landlord's claim.

The landlord appealed.

Stephen Terrell for the landlord. It is submitted that when Judge Konstam made the order of 1950 directing Mrs. Beard to give up possession of No. 48 Station Road on the terms that the landlord let to her No. 59 Station Road at the same rent as she was paying for No. 48 Station Road, he intended that she should become the statutory tenant of No. 59 Station Road in all respects on the terms and conditions on which she occupied the original premises. This appears from the fact that the landlord was required to allow Mrs. Beard to occupy the alternative accommodation at the old rent. Where a landlord furnishes a statutory tenant with alternative accommodation, which the court holds to be suitable accommodation satisfying the requirements of section 3 (3) of the Rent Restriction Act of 1933, the statutory tenancy, in effect, is transferred to such alternative accommodation. Section 3 does not envisage that the tenant shall have in respect of such alternative accommodation anything more than security of tenure reasonably equivalent to the security enjoyed in respect of the original premises. Mrs. Panter would not have been allowed to succeed to her mother's statutory tenancy of No. 48 Station Road; she should not be allowed to succeed to her mother's tenancy of the alternative accommodation.

C. W. S. Lubbock for Mrs. Panter was not called on to argue.

EVERSHED M.R. I agree with the judge in having some sympathy with the landlord in this case. He has come here, however, not for sympathy, but, if he can get it, an order for possession, and that, in my judgment, he cannot get. I agree, in other words, that the defendant, Mrs. Panter, is now in occupation by virtue of section 12 (1) (*g*) of the Act of 1920, though it appears that the landlord could, by taking the appropriate steps, increase the rent, which is now 10s. 11d. a week, to the full recoverable rent.

The matter turns on the circumstances that in February of 1950, in an action brought by the landlord against the then tenant, Mrs. Beard, for possession of another house, No. 48 Station Road, Chertsey, Judge Konstam made an order for possession of that house upon terms, by way of satisfying section 3 of the Act of 1933, that the landlord would let—and so far as we can tell those were the vital words—to Mrs. Beard another house, No. 59 Station Road, at a comparable rent, 10s. 11d. a week.

At the time of that order, Mrs. Beard was, in fact, the statutory tenant, having survived the previous tenant and herself taken advantage of section 12 (1) (*g*) of the Act of 1920. If, therefore, Mrs. Beard had remained at No. 48 Station Road and died there, her daughter, Mrs. Panter, could not have invoked that same section in order to preserve for herself a right of continued occupation. If, however, the effect of this order was to create a new contract of tenancy of No. 59 Station Road, Chertsey, then the fact that Mrs. Beard had herself succeeded under section 12 (1) (*g*) ceases to have any further relevance, and Mrs. Panter is now entitled, by virtue of section 12, to remain in possession of No. 59 Station Road after her mother's death.

It might be said that the intention of Judge Konstam was that everything should remain exactly as it was on February 7, 1950, with the mere substitution for No. 48 Station Road for No. 59, so that Mrs. Beard's statutory tenancy of No. 48 would, so to speak, be translated to No. 59, but I agree with the judge below that that is not a possible consequence. As I understand the position, a statutory tenancy can only come into existence, in accordance with the language of section 15 of the Act of 1920, by the circumstance that a tenant—that is, a contractual tenant—retains possession of the subject-matter of the tenancy after the contract has been determined. Therefore, it seems to me impossible to create a statutory tenancy when no previous relationship of landlord and tenant in respect of the premises has ever existed. If that is right, then it seems to me that all the other consequences follow.

In their efforts to give effect to the rent restriction legislation, county court judges are from time to time faced with the problem of finding for a tenant, as a term of an order for possession being made, alternative accommodation, and, in doing so, they try to put the tenant as nearly as may be in the same position as he or she was in before the possession order takes effect. I have said enough to show that, in my judgment, a court cannot create a statutory tenancy, as it were, out of the void, and, if orders of this kind are made, it is perhaps desirable that a little further consideration should be given to the precise intent behind the order. If what happened on the order of February 7, 1950, taking effect was to bring into operation a contractual tenancy at 10s. 11d. a week at No. 59 Station Road, and nothing more was said, it may well have been, though I do not so decide, that the landlord could on the very next day have served a notice to quit, as a preliminary to increasing the rent to the recoverable limit of 13s. 10d. If that is to be prevented, it may be that orders of this kind should contain a further undertaking, on the part of the landlord, that, so long as the tenant remains in occupation and complies with all the terms of the newly created tenancy, the landlord will not serve a notice determining the contractual tenancy, with a view to an increase of rent, without the leave of the court, or on such other terms as the county court judge may think proper.

In making orders of this kind, no doubt county court judges will consider, also, the possible effect, so far as succession under section 12 is concerned; though it does not perhaps happen very often, that the person against whom the order is being sought is himself or herself a " successor " under section 12.

Those observations are, however, by the way. The present appeal raises only the limited question whether the judge was right in holding, as he did, that no order for possession could now be made on these proceedings against Mrs. Panter, and, in my judgment, the judge was right in that conclusion, and I think that the appeal ought to be dismissed.

JENKINS L.J. I agree.

MORRIS L.J. I agree.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co. for Dawe & Co., Kingston-on-Thames; McNamara Ryan & Co.*

B. A. B.

PHARMACEUTICAL SOCIETY OF GREAT BRITAIN *v.* BOOTS CASH CHEMISTS (SOUTHERN) LD.

C. A.

1953
Feb. 5.

Somervell, Birkett and Romer L.JJ.

[1951 P. No. 1413.]

Poisons—Sale of—Self-service system—Selection of articles by customer from shelves—Payment at cash desk in presence of qualified pharmacist—Legality—Pharmacy and Poisons Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 25), *s.* 18 (1) (*a*) (iii).

Contract—Offer and acceptance—Sale of goods—Self-service—Time of sale.

The defendants' branch shop, consisting of a single room, was adapted to the "self-service" system. The room contained a chemist's department, under the control of a registered pharmacist, in which various drugs and proprietary medicines included, or containing substances included, in Part I of the Poisons List compiled under section 17 (1) of the Pharmacy and Poisons Act, 1933, (but not in Sch. I to the Poisons Rules, 1949), were displayed on shelves in packages or other containers, with the price marked on each. A customer, on entering the shop, was provided with a wire basket, and having selected from the shelves the articles which he wished to buy, he put them in the basket and took them to the cashier's desk at one or other of the two exits, where the cashier stated the total price and received payment. That latter stage of every transaction involving the sale of a drug was supervised by the pharmacist in control of the department, who was authorized to prevent the removal of any drug from the premises.

In an action brought by the plaintiffs alleging an infringement by the defendants of section 18 (1) (*a*) (iii) of the Pharmacy and Poisons Act, 1933, which requires the sale of poisons included in Part I of the Poisons List to be effected by or under the supervision of a registered pharmacist:—

Held, that the self-service system did not amount to an offer by the defendants to sell, but merely to an invitation to the customer to offer to buy; that such an offer was accepted at the cashier's desk under the supervision of the registered pharmacist; and that there was therefore no infringement of the section.

Decision of Lord Goddard C.J. [1952] 2 Q.B. 795; [1952] 2 T.L.R. 340; [1952] 2 All E.R. 456 affirmed.

APPEAL from Lord Goddard C.J.

Special case stated by the parties under R.S.C., Ord. 34, r. 1.

The defendants carried on a business comprising the retail sale of drugs at premises at Edgware, which were entered in the register of premises kept pursuant to section 12 of the Pharmacy and Poisons Act, 1933, and from which they regularly sold drugs by retail. The premises comprised a single room, so adapted that customers might serve themselves, and the business there was described by a printed notice at the entrance as "Boot's Self-"Service." On entry each customer passed a barrier where a wire basket was obtained. Beyond the barrier the principal part of the room, which contained accommodation for 60 customers, contained shelves around the walls and on an island fixture in the centre, on which articles were displayed. One part of the room was described by a printed notice as the "Toilet Dept.," and another part as the "Chemists' Dept." On the shelves in the chemists' department drugs, including proprietary medicines, were severally displayed in individual packages or containers with a conspicuous indication of the retail price of each. The drugs and proprietary medicines covered a wide range, and one section of the shelves in the chemists' department was devoted exclusively to drugs which were included in, or which contained substances included in, Part I of the Poisons List referred to in section 17 (1) of the Pharmacy and Poisons Act, 1933; no such drugs were displayed on any shelves outside the section, to which a shutter was fitted so that at any time all the articles in that section could be securely inclosed and excluded from display. None of the drugs in that section came within Sch. I to the Poisons Rules, 1949 (S.I. 1949, No. 539).

The staff employed by the defendants at the premises comprised a manager, a registered pharmacist, three assistants and two cashiers, and during the time when the premises were open for the sale of drugs the manager, the registered pharmacist, and one or more of the assistants were present in the room. Each customer selected from the shelves the article which he wished to buy and placed it in the wire basket; in order to leave the premises the customer had to pass by one of two exits, at each of which was a cash desk where a cashier was stationed who scrutinized the articles selected by the customer, assessed the value and accepted payment. The chemists' department was under the personal control of the registered pharmacist, who carried out all his duties at the premises subject to the directions of a superintendent appointed by the defendants in accordance with the provisions of section 9 of the Act.

The pharmacist was stationed near the poisons section, where his certificate of registration was conspicuously displayed, and was in view of the cash desks. In every case involving the sale of a drug the pharmacist supervised that part of the transaction which took place at the cash desk and was authorized by the defendants to prevent at that stage of the transaction, if he thought fit, any customer from removing any drug from the premises. No steps were taken by the defendants to inform the customers, before they selected any article which they wished to purchase, of the pharmacist's authorization.

On April 13, 1951, at the defendants' premises, two customers, following the procedure outlined above, respectively purchased a bottle containing a medicine known as compound syrup of hypophosphites, containing 0.01% W/V strychnine, and a bottle containing medicine known as famel syrup, containing 0.23% W/V codeine, both of which substances are poisons included in Part I of the Poisons List, but, owing to the small percentages of strychnine and codeine respectively, hypophosphites and famel syrup do not come within Sch. I to the Poisons Rules, 1949.

The question for the opinion of the court was whether the sales instanced on April 13, 1951, were effected by or under the supervision of a registered pharmacist, in accordance with the provisions of section 18 (1) (*a*) (iii) of the Pharmacy and Poisons Act, 1933.[1]

The Lord Chief Justice answered the question in the affirmative.

The Pharmaceutical Society appealed.

H. V. Lloyd-Jones Q.C. and *T. Dewar* for the Pharmaceutical Society. The real question at issue in this appeal is whether under the self-service system of trading devised by the defendants the sale in fact takes place at the point where the customer removes from the shelves the article that he wishes to buy, and puts it in the basket, or whether it takes place at the cash desk, where the money is paid and the pharmacist is stationed. We contend that the self-service system invites the customer to purchase, the price of each article being fully displayed, and that the taking of an article by the customer is an acceptance of the trader's offer to sell. Even if it be the law that a customer cannot demand goods merely because they are displayed in a shop window, the position is different where goods are displayed inside a self-service shop. It is submitted that the contract is made and the property passes at the moment when the customer takes an article from the shelf and puts it in the receptacle. [Cheshire and Fifoot's Law of Contract, 3rd ed., p. 26, and *Timothy* v. *Simpson*,[2] referred to.] In *Wiles* v. *Maddison* [3] a butcher was charged with offences against the Rationing Order, 1939, and the Meat (Maximum Retail Prices) Order, 1940, by offering meat for sale to registered customers at a price exceeding the maximum, and in excess of the rationing quantity. He was acquitted, although he had put aside the meat, with the price affixed, because the customers had given no specific orders for the meat and he had not intended to deliver it until the following day. In the words of Lord Caldecote C.J., "the facts were not such "to justify or permit a finding that there had been an offer." Tucker J., agreeing, said: "For myself, I think that the position "might be different if the course of conduct between the butcher "and the customer in this case had been different, that is to say, "if the evidence had been that the custom was for the butcher "to put . . . in his shop certain quantities of meat allocated to "certain customers at certain prices and if the practice had been "for the customers to call on a particular day and take away "the meat." In the present case, by their deliberately devised self-service system the defendants are making an offer to sell, and the customer, when he takes an article from the shelf and puts it in the receptacle, is accepting the offer. By section 17 (2) of the Sale of Goods Act, 1893, the property in goods passes when it is intended to pass, and here there is clearly an intention that the sale shall take place at the spot where the customer takes the article from the shelf. The intention of the legislature under the Act of 1933 was to interpose the possibility of guidance or veto on the part of the pharmacist when a customer is selecting poisons, and even though at the time of payment the pharmacist is present, the sales in question, it is submitted, were not effected in accordance with the provisions of section 18.

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[1] Pharmacy and Poisons Act, 1933, s. 18: "(1) . . . it shall not be "lawful—(*a*) for a person to sell any "poison included in Part I of the "Poisons List, unless—(i) he is an "authorized seller of poisons; and (ii) "the sale is effected on premises duly "registered under Part I of this Act; "and (iii) the sale is effected by, or "under the supervision of, a registered pharmacist."

[*Roberts* v. *Littlewood's Mail Order Stores* [4] also referred to.]

G. G. Baker Q.C. and *G. D. Everington* for the defendants were not called on to argue.

Somervell L.J. This is an appeal from a decision of the Lord Chief Justice on an agreed statement of facts, raising a question under section 18 (1) (*a*) (iii) of the Pharmacy and

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[2] (1834) 6 C. & P. 499.

[3] [1943] W.N. 40; [1943] 1 All E.R. 315, 317.

[4] [1943] K.B. 269.

Poisons Act, 1933. The plaintiffs are the Pharmaceutical Society, incorporated by Royal charter. One of their duties is to take all reasonable steps to enforce the provisions of the Act. The provision in question is contained in section 18. [His Lordship read the section and stated the facts, and continued:] It is not disputed that in a chemist's shop where this self-service system does not prevail a customer may go in and ask a young woman assistant, who will not herself be a registered pharmacist, for one of these articles on the list, and the transaction may be completed and the article paid for, although the registered pharmacist, who will no doubt be on the premises, will not know anything himself of the transaction, unless the assistant serving the customer, or the customer, requires to put a question to him. It is right that I should emphasize, as did the Lord Chief Justice, that these are not dangerous drugs. They are substances which contain very small proportions of poison, and I imagine that many of them are the type of drug which has a warning as to what doses are to be taken. They are drugs which can be obtained, under the law, without a doctor's prescription.

The point taken by the plaintiffs is this: it is said that the purchase is complete if and when a customer going round the shelves takes an article and puts it in the receptacle which he or she is carrying, and that therefore, if that is right, when the customer comes to the pay desk, having completed the tour of the premises, the registered pharmacist, if so minded, has no power to say: "This drug ought not to be sold to this customer." Whether and in what circumstances he would have that power we need not inquire, but one can, of course, see that there is a difference if supervision can only be exercised at a time when the contract is completed.

I agree with the Lord Chief Justice in everything that he said, but I will put the matter shortly in my own words. Whether the view contended for by the plaintiffs is a right view depends on what are the legal implications of this layout—the invitation to the customer. Is a contract to be regarded as being completed when the article is put into the receptacle, or is this to be regarded as a more organized way of doing what is done already in many types of shops—and a bookseller is perhaps the best example—namely, enabling customers to have free access to what is in the shop, to look at the different articles, and then, ultimately, having got the ones which they wish to buy, to come up to the assistant saying "I want this"? The assistant in 999 times out of 1,000 says "That is all right," and the money passes and the transaction is completed. I agree with what the Lord Chief Justice has said, and with the reasons which he has given for his conclusion, that in the case of an ordinary shop, although goods are displayed and it is intended that customers should go and choose what they want, the contract is not completed until, the customer having indicated the articles which he needs, the shopkeeper, or someone on his behalf, accepts that offer. Then the contract is completed. I can see no reason at all, that being clearly the normal position, for drawing any different implication as a result of this layout.

The Lord Chief Justice, I think, expressed one of the most formidable difficulties in the way of the plaintiffs' contention when he pointed out that, if the plaintiffs are right, once an article has been placed in the receptacle the customer himself is bound and would have no right, without paying for the first article, to substitute an article which he saw later of a similar kind and which he perhaps preferred. I can see no reason for implying from this self-service arrangement any implication other than that which the Lord Chief Justice found in it, namely, that it is a convenient method of enabling customers to see what there is and choose, and possibly put back and substitute, articles which they wish to have, and then to go up to the cashier and offer to buy what they have so far chosen. On that conclusion the case fails, because it is admitted that there was supervision in the sense required by the Act and at the appropriate moment of time. For these reasons, in my opinion, the appeal should be dismissed.

BIRKETT L.J. I am of the same opinion. The facts are clearly stated in the agreed statement of facts, and the argument on them has been very clearly stated by Mr. Lloyd-Jones. I think that clearest of all was the judgment of the Lord Chief Justice, with which I agree. In view of an observation which I made during the argument, I should like to add that under section 25 of the Pharmacy and Poisons Act, 1933, it is the duty of the Pharmaceutical Society of Great Britain, by means of inspection and otherwise, "to take all reasonable steps to "enforce the provisions of Part I of this Act"—that really deals with the status of the registered pharmacist—"and to secure "compliance by registered pharmacists and authorized sellers of "poisons with the provisions of Part II of this Act." This action has been brought by the Pharmaceutical Society in pursuance of that duty which is laid upon them by statute, and the short point of the case is, at what point of time did the sale in this particular shop at Edgware take place? My Lord has explained the system which had been introduced into that shop in March of 1951. The two women customers in this case each took a particular package containing poison from the particular shelf, put it into her basket, came to the exit and there paid. It is said, on the one hand, that when the customer takes the package from the poison section and puts it into her basket the sale there and then takes place. On the other hand, it is said the sale does not take place until that customer, who has placed that package in the basket, comes to the exit.

The Lord Chief Justice dealt with the matter in this way, and I would like to adopt his words [1]: "It seems to me, there-"fore, that the transaction is in no way different from the "normal transaction in a shop in which there is no self-service "scheme. I am quite satisfied it would be wrong to say that the "shopkeeper is making an offer to sell every article in the shop "to any person who might come in and that that person can "insist on buying any article by saying 'I accept your offer.'" Then he went on to deal with the illustration of the bookshop, and continued: "Therefore, in my opinion, the mere fact that "a customer picks up a bottle of medicine from the shelves in "this case does not amount to an acceptance of an offer to sell. "It is an offer by the customer to buy and there is no sale "effected until the buyer's offer to buy is accepted by the accept-"ance of the price. The offer, the acceptance of the price, and "therefore the sale take place under the supervision of the "pharmacist. That is sufficient to satisfy the requirements of "the section, for by using the words 'the sale is effected by, or "'under the supervision of, a registered pharmacist' the Act "envisages that the sale may be effected by someone not a "pharmacist. I think, too, that the sale is effected under his "supervision if he is in a position to say 'You must not have "'that: that contains poison,' so that in any case, even if I "were wrong in the view that I have taken on the question as "to when the sale was completed, and it was completed when "the customer took the article from the shelf, it would still be "effected under the supervision of the pharmacist within the "meaning of section 18."

I agree with that, and I agree that this appeal ought to be dismissed.

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[1] [1952] 2 Q.B. 795, 802.

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Romer L.J. I also agree. The Lord Chief Justice observed that, on the footing of the plaintiff society's contention, if a person picked up an article, once having picked it up, he would never be able to put it back and say that he had changed his mind. The shopkeeper would say: "No, the property has "passed and you will have to pay." If that were the position in this and similar shops, and that position was known to the general public, I should imagine that the popularity of those shops would wane a good deal. In fact, I am satisfied that that is not the position, and that the articles, even though they are priced and put in shops like this, do not represent an offer by the shopkeeper which can be accepted merely by the picking up of the article in question. I quite agree with the reasons on which the Lord Chief Justice arrived at that conclusion and which Birkett L.J. has just referred to, and to those observations I can add nothing of my own. I agree that the appeal fails.

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *A. C. Castle; Masons.*

A. W. G.

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Jan. 15, 16.

Jenkins and Morris L.JJ. and Roxburgh J.

GRIMSHAW *v.* DUNBAR.

[Plaint No. P.H. 185.]

County Court—New trial—Judgment given in defendant's absence—Defendant misled by court official as to necessity for attending hearing—New trial refused—Discretion wrongly exercised—Point of law—County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 105—*County Court Rules,* 1936, *Ord.* 37, *r.* 2.

The plaintiff, as landlord, brought an action against the defendant, as tenant of certain rent restricted premises, to recover possession on the ground that the tenant was in arrear with his rent. On June 30, 1952, three days before the hearing of the summons, the tenant attended at the county court and paid the arrears of rent in full into court, and an official at the court then told him that it would not be necessary for him to attend at the hearing since the summons would be dismissed by reason of the payment. On the summons coming on for hearing on July 3, in the tenant's absence, the judge, after hearing the landlord's evidence, made an order for possession on November 3, 1952. Notice of that order having been served on the tenant, he applied under the County Court Rules, 1936, Ord. 37, r. 2, for a new trial. That application was dismissed on October 28. The tenant appealed:—

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Held, that a party to an action is prima facie entitled to have it heard in his presence and that if by some mischance or accident a party is shut out from that right and an order is made in his absence, justice demands, so far as it can be given effect to without injustice to the other parties, that the party who was accidentally absent should be allowed to come to the court and present his case. In refusing the tenant a new trial, the judge had exercised the discretion conferred on him by Ord. 37, r. 2, on wrong considerations or on wrong grounds. His error was an error of law and the matter was appealable within the provisions of section 105 of the County Courts Act, 1934. The plaintiff's appeal should accordingly be allowed.

In certain circumstances the provision in Ord. 37, r. 2, that a new trial "may" be granted should, in effect, be construed as "must" be granted, as, for example, where a defendant, plainly through no fault of his own, arrives five minutes after an order against him has been made in his absence.

When determining whether to exercise his jurisdiction under Ord. 37, r. 2, of the County Court Rules, 1936, to order a new trial, the county court judge should be influenced by the following considerations: First, the reason why the party failed to appear when the case was heard. Secondly, whether there has been any undue delay by the absent party in launching his proceedings for a new trial; delay in itself would not be important, but delay prejudicing the other party, or delay enabling rights of third parties to intervene, would be material. Thirdly, whether the other party would be prejudiced by a new trial in any respect which could not be adequately compensated by a suitable award of costs. A new trial should seldom, if ever, be refused on the ground that the applicant's case was a weak one.

Dick v. *Piller* [1943] 1 K.B. 497; 59 T.L.R. 276; [1943] 1 All E.R. 627 followed.

Evans v. *Bartlam* [1937] A.C. 473; 53 T.L.R. 689; [1937] 2 All E.R. 646, and *Dellenty* v. *Pellow* [1951] 2 K.B. 858; [1951] 2 T.L.R. 733; [1951] 2 All E.R. 716 considered.

APPEAL from a decision of Judge Sir Gerald Hurst sitting at Bromley county court.

The plaintiff, Mrs. Isabelle Grimshaw, on June 5, 1952, instituted proceedings to recover possession of certain premises within the Rent Restriction Acts from Alexander Joshua Dunbar as tenant on the ground that he was in arrear with his rent. The particulars of claim alleged no other ground for possession beyond the fact of the arrears. On June 30 (that was, three days before the hearing of the summons) the tenant paid into court the full amount claimed, and costs. He alleged, and it was not disputed, that he was misled by information which he obtained from an official at the offices of the county court. He said that when he saw the official on June 30 in connexion with paying the money into court he asked whether, if he paid the full amount claimed into court, it would be necessary for him to be present at the hearing, or whether the summons would in that event automatically stand dismissed; and he said that the official informed him that in those circumstances it was unnecessary for him to attend. That advice was erroneous. At the hearing on July 3, the judge heard the landlord's side of the matter, but heard no argument or evidence on the part of the tenant, who did not appear. On that ex parte hearing, the judge came to the conclusion that, notwithstanding the payment into court, it would be reasonable to make an order for possession within the meaning of the relevant provisions of the Rent Restriction Acts, and he made an order accordingly for possession on November 3, 1952.

A few days after the judge had pronounced that judgment the tenant received a copy of it. He took no steps for some weeks, but on September 23, 1952, he served a motion to have the order of July 3, 1952, set aside. The matter came before the judge on October 28, 1952, and the only record of what took place before him on that occasion was the following memorandum: "This "application was made on October 28, 1952, and was dismissed, "but the time for giving possession was extended to January 1, "1953. No further application can be entertained. This is a "final order. . . ."

There appeared to have been no evidence before the judge in support of the application, and the matter was dealt with in a few minutes. There was before the Court of Appeal an affidavit filed on the part of the tenant which set out his story about the mistaken advice which he had received from the county court official and his receipt of the order awarding possession against him. He explained that he issued the application for a new trial on September 23, 1952, and that it was originally fixed to be heard on October 14, but that it did not come effectively before the judge until the 28th of that month. There was no evidence as to the judge's reasons for refusing the application.

The tenant appealed.

J. Sofer for the tenant. In this case the tenant applied under Ord. 37, r. 2, of the County Court Rules, 1936,[1] for a new trial.

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[1] County Court Rules, 1936, Ord. 37, r. 1: "(1) The judge shall in "every case have the power to order "a new trial to be held upon such "terms as he thinks reasonable, and "in the meantime to stay the pro- "ceedings."

Rule 2: "(1) Where a defendant to "an action or a defendant to a counter- "claim does not appear at the hearing

The county court judge dismissed the application. It is submitted that in doing so the judge was wrong in law, because when exercising his discretion to refuse to grant a new trial he should have given every fact its due weight, and that he did not do. The arrears of rent having been paid before the hearing, this is a case where prima facie an order for possession should not have been made. The court has jurisdiction to review the way in which the county court judge exercised his discretion. The decision of the Court of Appeal in *Weinbaum* v. *Klein* [2] shows that the court will under the power conferred by section 105 of the County Courts Act, 1934, interfere with the manner in which a county court judge has exercised his discretion if it has resulted in injustice. [He referred to the County Court Practice, 1952, pp. 116, 117.] In particular the Court of Appeal can review the exercise of the judge's discretion in refusing to order a new trial under the power conferred by the County Court Rules, 1936, Ord. 37, r. 2 (1), if the refusal amounts to a denial of justice. To deprive a defendant of his right to have his case heard is a denial of justice and amounts to an error of law: *Dick* v. *Piller.*[3] In this case the landlords would not have been prejudiced if a new trial had been ordered upon proper terms as to costs.

Denis Smith for the landlord. This appeal should not be allowed. There is nothing to show that there is any error of law here. All the facts were before the judge and it is submitted that he exercised his discretion on the right principles.

JENKINS L.J., having stated the facts, continued:—The question is whether the tenant has made out such a case of error of law on the part of the judge as would entitle this court to vary the order refusing a new trial which he made in exercise of the discretion reposed in him under Ord. 37, r. 2, of the County Court Rules, 1936. [His Lordship read the rule and continued:] It will be observed that the form of the rule is that " the judgment " or order and any execution thereon may on application be set " aside and a new trial may be granted ": in other words, the

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" and a judgment or order is given or " made against him in his absence, " the judgment or order and any execution thereon may on application " be set aside and a new trial may be " granted. (2) The application may, " if the parties are present, be made " on the day on which the judgment " or order was given or made, and in " any other case shall be made on " notice. (3) The application shall be " made to the judge if the judgment " or order was given or made by the " judge and in any other case to the " registrar."

[2] (1950) 66 T.L.R. (Pt. 1) 414; [1950] 1 All E.R. 353; [1950] W.N. 67.

[3] [1943] K.B. 497; 59 T.L.R. 276; [1943] 1 All E.R. 627.

rule is couched in language appropriate to the vesting of a discretion in the judge.

I should next say a few words about the principles on which this court acts in considering whether a case is made for interference with the exercise of a judicial discretion in the county court. The most useful case for that purpose is *Dick* v. *Piller.*[1] It was a decision of the majority of the court, consisting of Scott L.J. and Croom-Johnson J., du Parcq L.J. dissenting. The effect of the decision is sufficiently stated in the headnote. The case concerned an exercise by a county court judge of his discretionary power in regard to adjournment by refusing an adjournment sought owing to the illness of a witness. The headnote states: "When a witness in, or a fortiori a party to, an action "in a county court is alleged to be prevented by illness from "attending the court for a hearing of the case and the judge is "satisfied of the fact of his illness and of the materiality and "importance of his evidence and that the granting of an adjourn-"ment will not cause an injustice to the other party which cannot "be reduced by costs, it is the duty of the judge to grant an "adjournment, it may be on terms, and failure on his part to do "so constitutes a miscarriage of justice which necessarily involves "an error of law on which an appeal may be founded."

Scott L.J. put his view of the matter thus[2]: "The only "question in the appeal is whether the judge erred or misdirected "himself in law in refusing the adjournment. du Parcq L.J. "thinks that, if the judge erred, his error was an error of fact. "Croom-Johnson J. thinks there was an error of law. I have "read both judgments with care, and agree with the conclusion "arrived at by the latter, although I agree with the former that, "if the refusal of the adjournment had been an exercise of "discretion on a pure question of fact, no appeal would have "lain under section 105 of the County Courts Act, 1934. On the "facts relating to the application for adjournment, I think the "judge caused a serious miscarriage of justice, and that, in doing "so, he neglected a first principle of law, for he deprived the "defendant of his elementary right to be heard."

du Parcq L.J., in his dissenting judgment, found himself unable to discern a question of law in the matter; but in the course of his judgment he referred to this well-known passage from the judgment of Lord Atkin in *Evans* v. *Bartlam.*[3] du

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[1] [1943] K.B. 497.

[2] Ibid. 499.

[3] [1937] A.C. 473, 480, 481.

Parcq L.J. said[4]: " 'Appellate jurisdiction is always statutory: " 'there is in the statute no restriction upon the jurisdiction of " 'the Court of Appeal: and while the appellate court in the " 'exercise of its appellate power is no doubt entirely justified " 'in saying that normally it will not interfere with the exercise " 'of a judge's discretion except on grounds of law, yet if it sees " 'that on other grounds the decision will result in injustice " 'being done it has both the power and the duty to remedy it.' "

It should be noted that the discretion to which *Evans* v. *Bartlam*[5] related was a discretion exercised by a judge of the High Court, and, therefore, their Lordships were not embarrassed in that case with the effect of section 105 of the County Courts Act, 1934. But from the passage in Scott L.J.'s judgment to which I have already referred it will be seen that in the view of the Lord Justice similar considerations apply on appeals against an allegedly improper exercise of discretion by a county court judge.

Croom-Johnson J. dealt with the matter on what I may perhaps describe as rather more conventional lines. He summed up his view in these terms[6]: "It has, I think, always been " maintained that an exercise of judicial discretion on a wrong " principle is appealable. To exercise it on wrong considerations " or on wrong grounds, or to ignore some of the right considera- " tions, is, in my judgment, to decide on wrong principles. The " effect of the judge's order was to reject in advance the defen- " dant's evidence altogether. Why? Apparently, if we are to " accept the addendum to his note, on the ground that there was " no affidavit in support of the certificates or verifying them "— those were the medical certificates—and the judge went on to say that that was not a sufficient ground.

Applying the observations which I have just quoted from Croom-Johnson J.'s judgment to the present case, did the judge here exercise his discretion on wrong considerations, or on wrong grounds, or did he ignore some of the right considerations? If so, then he decided on wrong principles, his error was a matter of law, and this court can interfere. It was argued before us for the landlord that it had not been shown that the judge took anything into consideration which he ought not to have taken into consideration or failed to take into consideration anything which he should have taken into consideration. We were told nothing more than the bare fact that the application for a new trial was made and dismissed. There is this amount of force in that submission, that, prima facie, it is the duty of an appellant to provide the court with a sufficient record of what took place before the judge to enable this court to understand and deal with the matter. But I think that the truth here is that the application for a new trial was disposed of in a very few minutes, and the judge does not appear to have given any reasons. If he had given any reasons, no doubt the solicitors present would have made a note. In the result we have the facts which I have stated, and we have the judge's refusal recorded, so far as we are concerned, without reasons, and nothing more.

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[4] [1943] 1 K.B. 497, 503.
[5] [1937] A.C. 473.
[6] [1943] K.B. 497, 507.

Can it be said in those circumstances that the judge demonstrably proceeded on some wrong ground or excluded something from consideration which he ought to have considered? In my view, although no reasons have been given by a judge exercising, or refusing to exercise, a discretionary jurisdiction, it may nevertheless be possible, on looking at the facts, to say that, if the judge had taken all the relevant circumstances into consideration and had excluded from consideration all irrelevant circumstances, he could not possibly have arrived at the conclusion to which he came, because that conclusion on those facts involved a palpable miscarriage of justice. Thus one gets back, in effect, to the way in which the point was dealt with by Scott L.J. in *Dick* v. *Piller*.[7]

What were the matters to be taken into consideration here? Far be it from me to attempt an exhaustive statement of the considerations which should influence a judge in exercising his discretion under Ord. 37, r. 2; but I can, at all events, state a few considerations which are of the first importance. It is to be observed that in certain circumstances " may " in rule 2 should, I apprehend, in effect be construed as " must." Suppose a case where a defendant, plainly through no fault of his own, arrives five minutes after an order against him has been made and perfected in his unavoidable absence. If, in such a case, the defendant forthwith applies for a new trial, acting as promptly as he possibly can, then it seems to me difficult to see how a county court judge could be justified in refusing to exercise his discretion in favour of that defendant—at all events, on suitable terms as to costs, but perhaps in an extreme case such as I have mentioned, not even on any special terms as to costs.

With that in mind, I will mention some of the main considerations which I conceive should be regarded in the exercise of the judge's discretion. First, although there is no hard and fast rule about it, as I think Lord Atkin pointed out in *Evans* v. *Bartlam*,[8] it must be material for the judge to know why it was that the defendant failed to appear on the proper day when the case came into the list and was heard. How does this case stand as regards that matter? There is the undisputed statement of the tenant, which he has put on oath before us, to the effect that his absence was due to the wrong advice which he received from one of the officials of the court. One starts with that. The difficulty in which he finds himself is due to the fact that an official of the court unwittingly misled him. Secondly, has there been any undue delay by the absent party in launching his proceedings for a new trial? In answering that question I venture to think that delay in itself would not be important, but delay prejudicing the other party, or delay enabling rights of third parties to intervene, would be most material. How does the matter stand here as regards delay? The tenant did not move in the matter until, I think, September 23—that is some six weeks or so after he received the copy of the order. But in estimating the importance of that lapse of some six weeks it is right, I think, to bear in mind that the original order for possession did not direct possession to be given up until November 3, 1952, so at the date when the tenant launched his application there was plenty of time left for a new trial to be had without embarrassing the landlord (assuming him to be successful on the new trial) by having the tenant in his house for a longer period than he would otherwise have been and, therefore, perhaps impeding him in some future disposition or letting of the house that he might want to make.

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[7] [1943] K.B. 497.

Therefore, in this case I should not say that there had been any undue delay; and that conclusion is reinforced by the circumstance that when this application did come before the judge, and he refused it, he granted the tenant an extension of time for giving up possession to January 1, 1953. So the judge cannot have thought that there had been, up to the time when the matter came before him on October 28, any delay which would prejudice the landlord. The judge could on the same day have granted a new trial with every prospect that the new trial would have taken place before January 1, 1953.

Thirdly, will the landlord in this case be prejudiced by an order for a new trial? There may be cases where the order sought

[8] [1937] A.C. 473.

to be set aside has been acted on and circumstances have arisen (generally linked up, I should say, with some undue delay or other dereliction on the part of the defendant) which would make it unfair or inequitable that the case should be reopened. I see nothing in the facts of the present case which could be said to make an order for a new trial prejudicial to the landlord in any respect which could not be adequately compensated by a suitable award of costs.

Then there is a more debatable point, as I regard it, as to how far the judge should consider the prospects of success of the party applying for a new trial. No doubt the judge is entitled to satisfy himself that the party applying has a bona fide intention of defending the action, and that there is some possibility of his doing so with success. For example, I apprehend that if an admitted and self-confessed trespasser allowed judgment for possession to go in default in his absence, the judge would be entitled, on an application for a new trial, to refuse on the ground that he was palpably a trespasser and could not, whatever evidence he gave, possibly justify his presence in the house. But, short of cases of that kind, I think that a new trial should seldom, if ever, be refused merely on the ground that the applicant's case appears to be a weak one, and it is, moreover, difficult to see how the tenant's case here could on the face of it be classed as obviously weak in view of the payment into court. Be that as it may, a party to an action is prima facie entitled to have it heard in his presence; he is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the court. Prima facie that is his right, and if by some mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands, so far as it can be given effect to without injustice to other parties, that that litigant who is accidentally absent should be allowed to come to the court and present his case—no doubt on suitable terms as to costs, as was recognized in *Dick* v. *Piller*.[9]

Thus, while I have felt considerable hesitation in finding that this is a proper case in which to interfere with the judge's discretion—in particular a discretion exercised by so careful and experienced a judge as Sir Gerald—I have come to the conclusion that, on the facts of this case, the judge, if he had paid due

[9] [1943] K.B. 497.

regard to the considerations properly relevant to the exercise of his discretion, and to those considerations only, could not have done otherwise than order a new trial on suitable terms as to costs.

For these reasons I would allow the appeal.

MORRIS L.J. I have reached the same conclusion. When the application for a new trial came before the judge on October 28 it appears that it was accepted that the tenant had in fact been told by some official in the court before the date fixed for the action that it was not necessary for him to attend on the date appointed for the hearing of the action. That being so, it seems to me that the tenant showed a very compelling explanation for his non-attendance at the hearing; and he advanced very strong grounds in support of his application that there should be a rehearing. He had never been heard: his case had never been before the judge. That was not the fault of the landlord; but in the particular circumstances the tenant had this rather unusual but satisfactory explanation, the accuracy of which was apparently not doubted. That being so, it seems to me that, in the absence of some very good reason, the application for a new trial should have been acceded to; and I think further that, in the absence of some such good reason, not to accede to the application involved proceeding on a wrong principle in such a way as to amount to an error in law. If there was such an error in law, then the matter becomes appealable to this court under the provisions of section 105 of the County Courts Act, 1934, which provides that if any party to any proceedings in a county court is dissatisfied with the determination or the direction of the judge in point of law or equity, or on other grounds which I need not mention, then he may appeal to this court.

In my judgment, *Dick* v. *Piller*[9] is authority supporting the view to which I have referred. I make one further citation from *Dick* v. *Piller*,[9] in addition to those which my Lord has made. I refer to the concluding words in the judgment of Scott L.J., who was one of the majority in the court[10]: "*Jones* v. *S. R.* "*Anthracite Collieries Ld.*,[11] in the Court of Appeal, is authority "that the question raised by this appeal is covered by section 105 "of the County Courts Act, 1934, and, I think, affords some "support to the view I take that where a miscarriage of justice,

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[9] [1943] K.B. 497.

[10] Ibid. 500.

[11] (1920) 124 L.T. 462.

"such as I think took place here, occurs it necessarily involves "an error of law."

I therefore think that, unless there was some good reason pointing to a different result, there was a convincing case in favour of acceding to the application made, and that not to accede to it did, in the circumstances of this case, involve proceeding on a wrong principle, which in turn amounted to an error in law. But it has been said that on October 28, the county court judge went into the matter, and that, in effect, he came to the conclusion that there was nothing to try, or that on a retrial the result must have been reached which was reached originally in the absence of the tenant. I think that if, on an application for a retrial within Ord. 37, r. 2, it is quite manifest to a judge that there is really nothing to be tried, or if there are some special circumstances which make it clear that on a rehearing the same result as that already announced must again be reached, then it may well be that a judge could refuse an application. But I cannot regard the facts of the present case as being within any such principle.

In *Dellenty* v. *Pellow*,[12] in this court, Jenkins L.J., in delivering his judgment, with which the other members of the court agreed, said[13]: "I would agree, taking the questions in "that order, that prima facie where possession is sought on the "ground of non-payment of rent, and the tenant pays the rent "into court, or tenders it before judgment, it would not be "reasonable to make an order for possession." That being so, on the facts of this case, as the rent was paid into court prima facie it would not be reasonable to make an order for possession; but, of course, an order for possession could be made. The Lord Justice went on in the next sentence to say: "But in this case "the evidence showed that there had been a long history of "default on the part of the tenant, and that time after time it had "been necessary to issue a summons against him before the rent "could be extracted. This time again he had allowed his rent "to fall into arrear for more than a year, and did not pay until "the summons was issued and the case was about to be heard."

We have been told that on October 28 the tenant did not give evidence on oath and that the hearing took a matter of minutes; and the judge did not feel it necessary to make any notes of the points which were made before him. It seems to me that it would require a careful examination of the previous history in this case before any conclusion could be reached in regard to the question whether it was reasonable to make an order for possession. The landlord had not gone to court on October 28 prepared to argue his whole case; nor, so far as we can ascertain, did anything in the nature of a hearing of the case take place; nor was it the appropriate time for such a hearing. It could not possibly, in my judgment, be said that there was not a very substantial matter to be heard. The matter could not be disposed of in the course of a few minutes, but would require investigation of all the facts and would require also comparison of the facts when ascertained and when explanations were received and considered, with the facts in *Dellenty* v. *Pellow*.[14] Each case must obviously depend on its own facts.

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[12] [1951] 2 K.B. 858.

[13] Ibid. 859.

I cannot therefore accede to the view that what took place on October 28 demonstrated either that there was nothing really to be tried or that in any event the landlord must on a rehearing have received judgment. There was a case to be tried. I think that in view of the particular explanation stated, and not challenged, why the tenant had not been present at the hearing of the case, compelling reason was shown why he should be allowed to have a rehearing. I am sure that the judge devotes great care always to these matters, but on the facts of this case I have felt impelled to the view which I have expressed.

Roxburgh J. I agree. The explanation which the tenant offered for his non-attendance at the trial was compelling, and there is no reason to think that any doubt was thrown upon its truth: therefore the judge, in refusing the application for a new trial, must have been actuated by some consideration of weight and importance. It cannot have been delay, for the reason which my Lord has already given. What, then, can it have been? It must, I think, have been that the judge thought that the tenant was unlikely to succeed if there was a retrial. In my view, as a matter of law, he was not entitled to adopt that attitude at that stage. As has already been pointed out, on the authority of *Dellenty* v. *Pellow* [14] (where, as in this case, the rent was paid into court before the hearing) prima facie there must have been a case to be tried, because it would rest upon the landlord to prove that in the particular circumstances of this case that prima facie rule should be departed from; and by "evidence" in that passage the court certainly did not mean a mere statement of some advocate dealing with an application for a new trial, but evidence taken in the ordinary way at a trial, cross-examined to if the other side desired to cross-examine to it, and accepted after hearing any counter-evidence.

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[14] [1951] 2 K.B. 858.

In my judgment, therefore, this appeal should be allowed.

Appeal allowed.

Solicitors: *H. E. Thomas & Co.; Weller & Birrell.*

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Jenkins and Morris L.JJ. and Roxburgh J.

HICKSON *v.* HICKSON.
[Plaint No. H. 230.]

HICKSON *v.* HICKSON.
[Plaint No. H. 1001.]

County Court—Husband and wife—Jurisdiction—Issue of wife's chastity—Pending divorce proceedings—Maintenance agreement—Sums payable "so long as wife remains chaste"—Application under Married Women's Property Acts—Effect of allegation of adultery.

By a separation agreement of July 11, 1952, the husband agreed to pay to the wife "so long as the wife shall remain chaste" £3 per week for the maintenance of herself and the child of the marriage. In the first action the wife, alleging that the husband had in fact failed to make any payments under the agreement, claimed payment of arrears of the weekly sums payable thereunder. The husband denied liability, alleging that the wife had not remained chaste. On November 4, 1952, the wife was served with the husband's petition for divorce on the ground of the alleged adultery. The wife also brought proceedings under the Married Women's Property Acts with regard to a house, which she alleged was purchased by her and her husband jointly, and as to the ownership of certain furniture.

The two actions came on for hearing together on November 4, 1952. At the hearing the husband applied to have both cases adjourned pending the hearing of the divorce proceedings. No evidence was given of the wife's alleged adultery. The county court judge offered to allow the adjournment on certain terms which the husband refused. The county court judge then heard the two actions and gave judgment. The husband appealed against the refusal of the judge to grant an adjournment, contending that the judge, having been informed of the pending proceedings in the Divorce Court, was bound to adjourn the hearing:—

Held, first, that the judge had a discretion in the matter to refuse an adjournment and that he had not exercised his discretion

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on a wrong principle resulting in a miscarriage of justice. There had been no error of law, and the appeals should be dismissed.

Held, secondly, that the issue of adultery was not relevant to the determination of the application under the Married Women's Property Acts.

The King v. *Middlesex Justices* [1933] 1 K.B. 72; [1933] 2 K.B. 1; 49 T.L.R. 18; *Higgs* v. *Higgs* [1935] P. 28; 51 T.L.R. 22, and *Knott* v. *Knott* [1935] P. 158; 51 T.L.R. 499 considered and distinguished.

Appeals from Judge Richardson sitting at Gateshead county court.

The parties, Mrs. Margaret Hickson and James Hickson, were married in 1941. By a separation agreement dated July 11, 1952, they agreed to live separate and apart. The deed provided: "Whereas the husband has undertaken during the joint lives of "himself and his wife so long as the wife shall remain chaste or as "hereinafter appears to contribute to the maintenance of the wife "and of the child of the marriage Norma born on the 31st day of "May, 1947, of whom the wife shall have the custody such sum as "will after deduction of the appropriate rate of income tax for "the time being amount to the sum of £3 per week and the "parties hereto in pursuance thereof have agreed to enter into "the covenants hereinafter contained." Then followed various covenants, the first being: "The husband will pay to the wife "during the joint lives of himself and wife so long as they shall "be living apart the sum of 30s. per week and the sum of "30s. per week in respect of the said child Norma until she "shall attain the age of 16 years."

In one action the wife, by her particulars of claim, alleged that the husband had failed to make any payments under the agreement and she claimed arrears due between July 12, 1952, and October 11, amounting to £35. By his defence the husband denied that he was under any liability under the agreement, the substance of his case being that his wife had not remained chaste and that, accordingly, he was not liable to make any payments.

By a second summons, an application under the Married Women's Property Acts, the wife claimed a declaration that a house at Faraday Grove, Gateshead, was purchased by her and her husband jointly, and that the household furniture and effects set out in the schedule to her particulars of claim were bought by her out of moneys belonging to her or were gifts to her, and were her property. The two actions came on for hearing together.

Both proceedings were heard on November 4. On the same day the wife was served with a petition for divorce. Before the hearing there was some discussion between the solicitors for the parties in regard to an adjournment of the county court proceedings, but no agreement was reached.

When the two summonses came before the judge on November 4 applications were made on behalf of the husband that both should be adjourned pending the hearing of the divorce petition. The judge did not refuse an adjournment absolutely. He was willing to adjourn the proceedings, so far as the first action was concerned, if the money claimed by the wife as arrears was paid into court, and if the amount payable in respect of the child was paid by the husband. The husband would not accept those terms; he would agree to pay the money for the wife into court, but would not agree to pay more than 20s. in respect of the child.

The judge decided not to accede to the application for an adjournment. No evidence of the wife's alleged adultery was given. The judge gave judgment for the wife on her claim for £35, and on the second summons he directed that the house and the furniture, and effects in it, should be sold and the proceeds of sale divided between the husband and wife equally.

The husband did not appeal against the decisions in the two actions, but he appealed against the refusal of the judge to adjourn the hearing pending the determination of the divorce proceedings.

Bruce Campbell for the husband. It is submitted that the county court judge should not have refused to adjourn these proceedings pending the hearing of the husband's petition for divorce. In *The King v. Middlesex Justices* [1] the Divisional Court held that the jurisdiction of the Divorce Court, when it has become seised of a matrimonial cause, is an exclusive and overriding jurisdiction and ousts that of the justices under the Guardianship of Infants Acts. On appeal [2] the Court of Appeal dismissed the appeal on the ground that the question was res judicata and expressed no opinion on the question whether the justices had concurrent jurisdiction with the Divorce Court. It is submitted that the Divisional Court was right and that as the liability here of the husband depends on whether the wife has committed adultery, the question to be determined in the divorce proceedings, the county court judge should have adjourned the proceedings. It appears from the decisions in *Higgs* v. *Higgs* [3] and *Knott* v. *Knott* [4] that a court of inferior jurisdiction should not attempt to prejudge an issue which is before a higher court. If the wife has committed adultery that would afford a complete defence to her claim under the deed of maintenance. Her adultery would also be a factor of major importance in determining the questions arising under the Married Women's Property Acts. The court is asked to say that the county court judge was wrong in law in not granting an adjournment. The husband asks that the two applications should await the determination of the divorce proceedings. The wife will not be prejudiced by the delay since she is entitled to alimony in the meantime.

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[1] [1933] 1 K.B. 72.

[2] [1933] 2 K.B. 1; 49 T.L.R. 18.

Michael Eastham for the wife was not called on to argue.

JENKINS L.J. I will ask Morris L.J. to deliver the first judgment in this case.

MORRIS L.J. stated the facts, and continued: It seems to me that different considerations apply in regard to the two proceedings, for in regard to those under the Married Women's Property Acts it is very difficult to see how a determination as a matter of fact in regard to the ownership of the property as between the husband and the wife could be affected by any question whether one of the spouses had or had not at a time after the property was acquired committed a matrimonial offence. But it is plain that the judge did not refuse out of hand to consider the application for adjournment; on the contrary, he went into the matter and considered possible terms, and it was only when there had been a failure to agree that the judge decided that he would not grant an adjournment.

So far as the action was concerned, the course that was then adopted was that the advocate for the husband did not call evidence on the issue of the alleged adultery of the wife. It is plain that it was made clear to the judge that the reason why the adjournments were applied for was that it was said that the court in which the issue of adultery should be determined was the Divorce Court, and that there was a pending petition in the sense that a petition had been filed and served, though the matter was not ready for hearing. The issue in the action in the county court was whether the husband did or did not under the terms of a contract owe a sum of money to his wife. Incidentally, in the determination of that issue the husband proposed to raise a question that his wife had not remained chaste.

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[3] [1935] P. 28; 51 T.L.R. 22.

[4] [1935] P. 158; 51 T.L.R. 499.

It seems to me that, if Mr. Bruce Campbell is to succeed in his application before us, he must show that there was some error of law, and, in turn, that involves that he must show that the judge either had no discretion in this matter to refuse an adjournment or that he exercised his discretion on a wrong principle resulting in a miscarriage of justice and, accordingly, that an error in law took place. No authority has been cited by Mr. Bruce Campbell before us showing that any such question as that now before us has ever arisen in regard to an action in the county court. Different considerations apply where an issue is raised in a court of summary jurisdiction which is also an issue to be determined in the Probate, Divorce and Admiralty Division. Mr. Bruce Campbell has referred us to three authorities. The first was *The King* v. *Middlesex Justices.*[1] I do not propose to refer fully to that case for the reason that, when it came to this court, it was determined on the point that the matter had been res judicata before the justices. The facts of that case were that in 1930 the husband petitioned for the dissolution of his marriage; his wife appeared but did not defend; then in the next year, in August of 1931, after the decree had been made absolute, the wife applied to a court of summary jurisdiction for an order under section 5 of the Guardianship of Infants Act, 1886, for the custody and maintenance of a child of the marriage. It was pointed out to the bench that the marriage of the parties had been dissolved and that the wife, having appeared, was entitled under the Matrimonial Causes Rules to be heard in the Divorce Court as to the custody of the children. The chairman said: "If that is the case we "think the application should be made there." In April, 1932, the application was renewed by the wife to the justices, and a differently constituted court made an order giving her the custody of the child. There was an application for a writ of certiorari, and it was held by the King's Bench Divisional Court that the matter was res judicata by the decision of August, 1931, whether that were regarded as a refusal to make an order, from which refusal there had been no appeal, or as a decision that the matter was one which would more conveniently be dealt with by the High Court. It was further held in the Divisional Court that the jurisdiction of the Divorce Court, when it had become seised of a matrimonial cause, was an exclusive and overriding jurisdiction and ousted that of justices under the Guardianship of Infants Act. When the matter came before this court, the second point was left open, for the decision of the Divisional Court was affirmed, as I have said, on the ground that the matter was res judicata.

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[1] [1933] 1 K.B. 72; [1933] 2 K.B. 1.

The two decisions on which Mr. Campbell principally relied were *Higgs* v. *Higgs*[2] and *Knott* v. *Knott*.[3] In the second of those cases, which was heard by Sir Boyd Merriman P. and Bucknill J., the President said that he might have dealt with it by following what he had decided in *Higgs* v. *Higgs*,[4] but he went into the matter very fully, particularly because at the time when *Higgs* v. *Higgs*[4] was before the court they had not been aware that the *Middlesex Justices'* case[5] had gone to the Court of Appeal, and that the Court of Appeal had not dealt with the matter save on the issue of res judicata. The headnote to the second case reads[6]: "During the pendency of "a matrimonial suit in the High Court on an issue as to "adultery, conflict of jurisdiction may arise from the simultaneous prosecution in a court of summary jurisdiction "under the provisions of the Summary Jurisdiction (Separation "and Maintenance) Acts, 1895 to 1925, of proceedings incidentally raising the same issue. The issue as to adultery is "paramount, the High Court alone having power to dissolve the "marriage if adultery be established, while the jurisdiction "exercised by the inferior court provides other relief during the "continuance of matrimonial status. Proceedings in the inferior "court should accordingly be stayed pending the decision of "the paramount issue in the High Court"; and Sir Boyd Merriman P. and Bucknill J. discussed the respective jurisdictions and the methods of harmonizing them.

Sir Boyd Merriman P. said[7]: "In a case like the present, "however, the court already has seisin of the cardinal issue of "adultery, and ought, unless the statute compels the opposite "conclusion, to be able to try that issue upon the evidence of "the witnesses, unembarrassed by the fact that a Divisional "Court have accepted, or rejected, on evidence necessarily viewed "at second hand, a decision of the justices given at a time when "the very issue was pending in this court." The President had pointed to the consideration that an appeal from justices would

[2] [1935] P. 28.
[3] [1935] P. 158.
[4] [1935] P. 28.
[5] [1933] 1 K.B. 72; [1933] 2 K.B. 2.
[6] [1935] P. 158.
[7] Ibid. 166.

lie to a Divisional Court of the Probate, Divorce and Admiralty Division. He proceeded: "It might very well be that, on seeing "the demeanour of the witnesses, the judge trying the suit would "come to a conclusion different from that arrived at by the "justices and affirmed by this court upon the notes of the "evidence reported by the clerk to the justices. Though such a "result might be justifiable as a matter of logic, it would "obviously be most unfortunate, and might very well be charac-"terized in the robust words of Avory J. in *The King* v. *Middlesex* "*Justices*[8] on which we based our decision in *Higgs* v. *Higgs*."[9]

Sir Boyd Merriman P. continued[10]: "On further considera-"tion therefore I am not prepared to depart from the decision "of this court in *Higgs* v. *Higgs*.[11] Though I recognize the "distinction to which counsel has called attention, I think that, "whatever may be the ultimate relief sought, the substance of "the matter is that, when the issue of the adultery of the wife is "pending in both courts, it should be decided exclusively by this "court"; the President concluded his judgment by saying: "It remains to consider what is the proper order to be made. "In my opinion the finding of the justices should be set aside "on the ground that they should not have proceeded to a "determination of the matter after their attention had been "called to the conflict of jurisdiction and to the authorities, and "that the matter should be remitted to them for rehearing, but "that such hearing should be stayed until the determination of "the issue of the wife's adultery by this court. This will keep "the complaint alive. I need scarcely add that if in this, or in "any other case in which this question arises, this court were "satisfied that the suit was not being duly prosecuted, but was "merely being used for the purpose of prolonging the payments "under the order, the court would have ample power to deal "with this matter in such a way that the justices would regain "jurisdiction."

The principles and the practice laid down by the President in that case and in the earlier case of *Higgs* v. *Higgs*[11] are, of course, followed and are not in question. But it does not seem to me that a reference to those authorities and to the practice that is followed in cases in courts of summary jurisdiction gives conclusive guidance in regard to the point that is now before us, which concerns the hearing of a civil action for debt brought

[8] [1933] 1 K.B. 72, 80.
[9] [1935] P. 28.
[10] [1935] P. 158, 167.
[11] [1935] P. 28.

in the county court. I see no reason why the judge was obliged to accede to this application. He might have done so; it was within his discretion. He considered the matter fully; but I cannot see that it can be said that he had no option but to postpone a determination of the matter raised in the action—namely, whether the husband did or did not owe a particular sum to his wife.

It is put in the notice of appeal that the judge was wrong in law in refusing the application for an adjournment. I cannot take that view at all. I see no error of law on the part of the judge.

The same considerations apply, I think, in regard to the other proceedings, but apply with even greater force. As I indicated earlier, it does not seem to me that a consideration as to the conduct during marriage of one of the spouses ought to affect the decision of the court in the proceedings under the Married Women's Property Acts. The first ground of appeal in regard to these other proceedings is stated thus: that the wife's rights depend on or are liable to be affected by the wife's conduct during marriage. I am not persuaded that that is so, and it seems to me that the judge had before him the issues defined in the pleadings and he was concerned to consider, on evidence, where was the ownership of the property and where was the ownership in regard to the various chattels. No complaint is made as regards the determination by the judge, as matter of fact, of those issues.

For those reasons, in my judgment, the judge did not fall into any error of law and there is no reason to criticize the decisions at which he arrived.

ROXBURGH J. I agree. I agree with my Lord that the two appeals must be differentiated. As regards the second appeal, which relates to the ownership of property, I cannot see how the issue of adultery is relevant to the determination of those matters, and I cannot see any reason why there should have been an adjournment. As regards the first appeal, on the other hand, the position is quite different. There is there a common question of fact to be determined: namely, the question of adultery, which is plainly relevant both to the subject-matter of the first appeal and also to the matrimonial cause.

For myself, I cannot accept *Knott* v. *Knott*[12] as the foundation for a broad proposition that whenever a county court is faced with an issue of adultery, then if there is a matrimonial cause pending the court is absolutely debarred from adjudicating upon that issue. It seems to me that there is nothing in *Knott* v. *Knott* [12] to suggest a broad proposition of that kind. On the other hand, it would generally be convenient that the decision of such an issue in the county court should be postponed until after its decision in the High Court, but usually not unconditionally. In almost every case it would be proper to require some term as a condition of granting the adjournment. In this case it is plain that the county court judge was prepared to adjourn both cases, though I am only really concerning myself with the first. He was prepared to adjourn the cases on certain terms. Mr. Campbell submitted that when (as was undoubtedly the case) the husband refused to accept the terms which were being suggested, and which plainly had the approval of the county court judge (if he was not even doing more than that, namely, insisting upon them), the county court judge ought to have made an order that the case be adjourned on certain terms. For my own part, I cannot see how he could possibly have done that. The question of adjournment had to be decided then and there. He was either to go on with the case or he was not. As far as I know he had no power to make an order in invitum upon the husband to pay 30s. a week during the pendency of the divorce proceedings. All that he could do was what he seems to have done, namely, to say: "You, the husband, want "an adjournment. I will give you an adjournment if you will "accept certain terms"; and then if the husband says: "I "will not accept those terms," I, for my part, cannot see what he could have possibly done except go on with the case, which is what he did.

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[12] [1935] P. 158.

JENKINS L.J. I agree, and have nothing to add.

Appeals dismissed.

Solicitors: *Gibson & Weldon, for Thomas Magnay, Gateshead; Isadore Goldman, for Crute & Sons, Newcastle-upon-Tyne.*

B. A. B.

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[12] [1935] P. 158.

KING AND ANOTHER v. PHILLIPS.

[1951 K. 1228.]

C. A.

1953
Jan. 23;
Feb. 16.

Singleton, Denning and Hodson L.JJ.

Negligence—Shock—Injury to child—Negligence of driver of motor-vehicle—Liability to mother for shock—Extent of duty—Remoteness of damage—Area of potential danger.

A taxicab driver backed his taxicab into a small boy on a tricycle. The damage to the boy and his tricycle was slight, but his mother heard him scream and, looking out of an upstairs window some 70 to 80 yards away, saw the tricycle under the taxicab but could not see the boy. He eventually ran home, but his mother had suffered nervous shock, an injury for which she claimed damages. McNair J. held that the defendant was under no liability to the mother. On appeal:—

Held, that the defendant had not, by his servant the driver, done a legal wrong to the mother, for, on the facts as found, and applying the test laid down in *Bourhill* v. *Young* [1943] A.C. 92; [1942] 2 All E.R. 396, no "hypothetical reasonable observer" could reasonably or probably have anticipated that injury either physical or nervous could have been caused to her by the backing of the taxi without due attention as to where it was going, and, accordingly, the driver owed no duty to the plaintiff and was not negligent towards her.

Per Denning L.J. If (as he considered) the duty owed by the driver to everyone in the vicinity was to drive with reasonable care, his liability for a breach of that duty depended on whether the damage sustained could be said to be too remote; but if the duty was to use reasonable care to avoid injury which he could reasonably foresee, the extent of the duty varied in regard to the different kind of injuries likely to be occasioned, and that involved recognition of two torts, the infliction of physical injury and of emotional injury. In *Hambrook* v. *Stokes Brothers* [1925] 1 K.B. 141; 41 T.L.R. 125, as here, a duty of care was owed by the defendant to the plaintiff, though in neither case was she in any personal danger and was at some distance from the vehicle, but, on the facts here, the damage was too remote to be reasonably foreseeable.

Bourhill v. *Young* [1943] A.C. 92; [1942] 2 All E.R. 396 followed.

Hambrook v. *Stokes Brothers* [1925] 1 K.B. 141; 41 T.L.R. 125 distinguished.

Decision of McNair J. [1952] W.N. 393; [1952] 2 T.L.R. 277; [1952] 2 All E.R. 459 affirmed.

APPEAL from McNair J.

The following statement of facts is taken substantially from the judgment of SINGLETON L.J.:—On August 2, 1951, a small boy, Michael Charles King, was on his tricycle in Birstall Road, Tottenham, about the point where Birstall Road joins Greenfield Road. A taxicab, owned by the defendant, Phillips, and driven by his servant, called at a house in Greenfield Road, and, having picked up the fare, was backing into Birstall Road so that it might return towards Seven Sisters Road, when the driver heard a call. Apparently the taxicab had struck the boy's tricycle. The boy was slightly hurt and the tricycle was damaged. The boy gathered himself together and ran back towards his home in Birstall Road. He brought an action through his mother against the defendant claiming damages for personal injuries. His injuries being very slight, McNair J. assessed the damages to which he was entitled at £5, together with £10 in respect of the tricycle. [An appeal as to the amount of damages to which he was entitled was dismissed.]

The boy's mother, Mrs. Kathleen Clara King, also brought an action. She was at an upstairs window in No. 12, Birstall Road, about six houses up on the right-hand side of the road from Greenfield Road and about 70 or 80 yards away from the site of the accident. She heard a scream, looked down the road, and saw the taxicab backing on to the tricycle and the tricycle under the taxicab, but she could not see the boy. She ran downstairs and into the road, and then she met the boy running towards her, and took him inside. As a result of what she had heard and seen, she suffered trembling fits, and became distressed and tearful. She consulted her doctor on August 17 and continued to attend him until November. McNair J. was satisfied that her condition as spoken to by her doctor was directly caused by what she heard and saw at the time of the accident; and, subject to liability, he assessed the damages in her case at the sum of £100.

McNair J. decided, however, that there was no liability on the defendant in respect of the mother's claim, and on that he gave judgment for the defendant. The plaintiff mother appealed.

F. G. Paterson for the plaintiff mother. The defendant's servant, the taxicab driver, was under a duty to everyone in the vicinity to drive with reasonable care and, if he failed in that duty, he was liable to anyone who sustained injury, whether physical or emotional, as a result of his negligence. It is clear from *Hambrook* v. *Stokes Brothers*[1] that injury by shock to a mother who is put in fear for the safety of her children is actionable.

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[1] [1925] 1 K.B. 141; (1925) 41 T.L.R. 125.

[SINGLETON L.J. But in *Hambrook* v. *Stokes Brothers* [1] the mother was a wayfarer even though she may have been some distance from the scene of the accident. Here the mother looked out of a window 70 to 80 yards away.]

The driver was in breach of the duty he owed and, applying *In re Polemis and Furness, Withy & Co. Ld.*,[2] he was liable for all the direct consequences of his negligence whether they could reasonably have been foreseen or not. [Counsel referred also to *Chester* v. *Waverley Corporation*.[3]] But if that is wrong it is submitted that, in a neighbourhood of this sort, the taxicab driver should have foreseen that a small child playing in the street on his tricycle alone was not likely to be far from home, and if he was injured his mother was probably near at hand and might suffer from shock. The hypothetical reasonable taxicab driver sitting notionally in his cab would or ought to have foreseen the injury. It was natural that the mother should be shocked and she was in fact injured by shock.

In *Bourhill* v. *Young* [4] the court found, on the other hand, that the possibility of injury to the fish-wife standing on the pavement was not foreseeable. There was no direct connexion between her and the accident; she merely heard a noise but could not see what was happening. In the present case the mother saw the tricycle under the cab, having heard her little boy scream. Here she was within the scope of the accident.

[SINGLETON L.J. In *Hambrook* v. *Stokes Brothers* [5] it was said that, in considering the duty owed, the court should bear in mind the likelihood of injury to someone if the duty was not observed, but that if negligence was proved the negligent person was responsible for all the damage which actually flowed from his or her negligence. That was not, apparently, the approach in *Bourhill* v. *Young*,[6] or the court might have said that as the cyclist had been negligent he was liable for all the damage flowing naturally from his acts, and as it was found as a fact that the fish-wife had sustained injury resulting from the shock she received, ought he not, on the principle in *Hambrook* v. *Stokes Brothers*,[7] to have been liable?]

Bourhill v. *Young* [8] is distinguishable from *Hambrook* v. *Stokes Brothers*,[9] both on the facts and the questions involved.

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[1] [1925] 1 K.B. 141; 41 T.L.R. 125.
[2] [1921] 3 K.B. 560.
[3] (1939) 62 C.L.R. 1.
[4] [1943] A.C. 92; [1942] 2 All E.R. 396.
[5] [1925] 1 K.B. 141.
[6] [1943] A.C. 92.
[7] [1925] 1 K.B. 141.
[8] [1943] A.C. 92.
[9] [1925] 1 K.B. 141.

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Hambrook v. *Stokes Brothers* [9] was commented on in *Bourhill* v. *Young*,[10] but the comments were obiter and the case was not overruled. This case is covered by *Hambrook* v. *Stokes Brothers* [11] and is a much stronger case, for in that case the mother was further away from the accident and did not actually see it.

[Counsel referred also to *Owens* v. *Liverpool Corporation*.[12]]

Norman Wiggins for the defendant. The defendant owed no duty to the plaintiff for, on the principle of *Bourhill* v. *Young*,[13] she was outside the range of the reasonable anticipation of the taxicab driver. As the driver owed no duty to her he was not negligent towards her, though admittedly he was negligent towards the child. [Counsel referred to Lord Wright's comments on *Owens* v. *Liverpool Corporation* [14] in *Bourhill* v. *Young*.[15]] It was beyond the range of reasonable anticipation that somebody should suffer in this particular way.

[SINGLETON L.J. But in *Hambrook* v. *Stokes Brothers* [16] Atkin L.J. said that if the driver was negligent and damage resulted he was responsible whether the damage was that which he might have expected or not, subject only to the question of remoteness. That statement seems to conflict with *Bourhill* v. *Young*,[17] yet *Hambrook* v. *Stokes Brothers* [18] was said not to be overruled by that case, and indeed Lord Wright said [19] that it "now lays down the law."]

In that passage Lord Wright was referring to *Dulieu* v. *R. White & Sons* [20] and not to *Hambrook* v. *Stokes Brothers*.[21] *Hambrook* v. *Stokes Brothers* [21] is distinguishable from *Bourhill* v. *Young* [22] because negligence towards the mother was admitted in the pleadings in *Hambrook* v. *Stokes Brothers*,[23] so that there could be no question of whether any duty was owed to her; the only question was whether the damage she suffered was too remote. In *Bourhill* v. *Young*,[24] on the other hand, the question at issue was whether there was a duty owed or not. In *Hambrook* v. *Stokes Brothers* [25] the plaintiff was a wayfarer and she may have been in some fear for her own personal safety. The sudden descent of a runaway lorry is a much more terrifying thing than the slow, though negligent, backing of a taxicab. In the present case the plaintiff was upstairs and the driver could not be expected to foresee that she might be within sight if she looked out of the window.

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[9] [1925] 1 K.B. 141.
[10] [1943] A.C. 92.
[11] [1925] 1 K.B. 141.
[12] [1939] 1 K.B. 394; 55 T.L.R. 246; [1938] 4 All E.R. 727.
[13] [1943] A.C. 92.
[14] [1939] 1 K.B. 394.
[15] [1943] A.C. 92, 110.
[16] [1925] 1 K.B. 141, 157.
[17] [1943] A.C. 92.
[18] [1925] 1 K.B. 141.
[19] [1943] A.C. 92, 111.
[20] [1901] 2 K.B. 669, 675; (1901) 17 T.L.R. 555.
[21] [1939] 1 K.B. 394.
[22] [1943] A.C. 92.
[23] [1939] 1 K.B. 394.
[24] [1943] A.C. 92.
[25] [1939] 1 K.B. 394.

The application of the test stated in *Bourhill* v. *Young*[26] depends on the good sense of the judge as to whether in fact the defendant can be said to owe a duty to the plaintiff. On the facts as found by McNair J. the present case is not a marginal one. The plaintiff was a long way from the scene of the accident; she was upstairs and no reasonable hypothetical driver could have foreseen that she would be shocked if he backed his taxicab negligently; she was outside the area of potential danger. Therefore, he owed her no duty and though, as in *Bourhill* v. *Young*,[26] the driver was admittedly negligent, he was not negligent vis-à-vis the plaintiff. The test is, first, whether there is a duty, secondly, whether there is negligence, and, finally, whether the damage which is complained of is the direct result of that negligence. Here there was no duty and no negligence.

Paterson replied.

Cur. adv. vult.

February 16. SINGLETON L.J., having stated the facts substantially as set out above, continued:—It is clear that a person who sustains damage from nervous shock has a right of action against the person whose negligence caused the shock. An allegation of negligence postulates a breach by the defendant of a duty owed by him to the plaintiff. In the civil law there is no such thing as negligence at large; liability only arises where there is a duty to take care and where failure in that duty has caused damage.

McNair J. delivered a considered judgment in favour of the defendant. In so deciding he followed the House of Lords in *Bourhill* v. *Young*,[1] in which it was held: "(1) that the duty "of the motor cyclist on the public road to other persons "using it was to drive with such reasonable care as would avoid "the risk of injury (including injury by shock although no direct "impact occurred) to such persons as he could reasonably foresee "might be injured by his failure to exercise that care; (2) that the "appellant was not within the area of potential danger arising as

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[26] [1943] A.C. 92.

[1] [1943] A.C. 92.

"the result of his negligence, and, accordingly, he owed no duty "to her and was not guilty of negligence in relation to her." I do not see that McNair J. could come to any other conclusion, having regard to what was said in that case. The view of each of the Law Lords was that, on the facts, no duty was owed to the appellant by the motor-cyclist who collided with a motor-van. At the time of the collision the appellant was on the offside of a tramcar which the motor-cyclist had passed on its nearside. The point of impact was some 45 to 50 feet beyond her and the tramcar was between her and the vehicles which came into collision. It was clear that the motor-cyclist was at fault and that, in relation to the driver of the motor-car, he was guilty of negligence, but it was held that he owed no duty to the appellant, and that, consequently, vis-à-vis her he was not negligent.

The test was put by Lord Russell of Killowen in this way [2]: "Can it be said that John Young could reasonably have anticipated that a person, situated as was the appellant, would be "affected by his proceeding towards Colinton at the speed at which "he was travelling?" Lord Macmillan said [3]: "But can it be "said that he ought further to have foreseen that his excessive "speed, involving the possibility of collision with another vehicle, "might cause injury to the appellant?" He was of opinion that John Young was under no duty to the appellant to foresee that his negligence in driving at an excessive speed, and consequently colliding with a motor-car, might result in injury to her, for such a result could not reasonably and probably have been anticipated; thus he was not guilty of negligence in relation to the appellant. Lord Wright [4] said that the appellant was completely outside the range of the collision, and added: "I "cannot accept that John Young could reasonably have foreseen, "or, more correctly, the reasonable hypothetical observer could "reasonably have foreseen, the likelihood that anyone placed as "the appellant was, could be affected in the manner in which "she was." Lord Porter said [5]: "In order, however, to establish "a duty towards herself, the appellant must still show that the "cyclist should reasonably have foreseen emotional injury to her "as a result of his negligent driving, and, as I have indicated, "I do not think she has done so."

The appellant in *Bourhill* v. *Young* [6] was not very far from the scene of the accident, and one would have thought that

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[2] [1943] A.C. 92, 102.

[3] Ibid. 105.

[4] Ibid. 111.

[5] Ibid. 119.

[6] [1943] A.C. 92.

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the motor-cyclist owed her a duty, and would have been responsible to her in damages, if, as the result of the collision with the motor-car, there had been an explosion which caused bodily injury to her, but Lord Thankerton said [7]: "At the time of the "collision with the motor-car he was well past the tramcar, and "the appellant was not within the range of his vision, let alone "that the tramcar obstructed any view of her. The risk of the "bicycle ricochetting and hitting the appellant, or of flying glass "hitting her, in her position at the time, was so remote, in my "opinion, that the cyclist could not reasonably be held bound "to have contemplated it." Lord Thankerton was, of course, dealing with a claim in respect of nervous shock, and his observation on this point must be limited to the case with which he was dealing. As I have said, the view of all their Lordships in that case was that the motor-cyclist owed no duty to the appellant, and that consequently he was not guilty of any negligence in relation to her, so that she could not recover damages for the shock which she had sustained.

[His Lordship referred to the facts of the present case and continued:] If there was no duty owed to the appellant in *Bourhill* v. *Young*,[7] I cannot see how there was any owed by the defendant to the mother on the facts of this case. In *Bourhill* v. *Young* [7] Lord Russell of Killowen [8] and Lord Macmillan [9] adopted the words of Lord Jamieson [10]: "No doubt "the duty of a driver is to use proper care not to cause injury to "persons on the highway or in premises adjoining the highway, "but it appears to me that his duty is limited to persons so placed "that they may reasonably be expected to be injured by the "omission to take such care." And Lord Macmillan added: "The duty to take care is the duty to avoid doing or omitting to "do anything the doing or omitting to do which may have as its "reasonable and probable consequence injury to others, and the "duty is owed to those to whom injury may reasonably and "probably be anticipated if the duty is not observed."

Can it be said that the driver (or any driver in the world) could reasonably or probably anticipate that injury—either physical or from shock—would be caused to the mother, who was in No. 12 Birstall Road, when he caused his taxicab to move backwards a short distance along Greenfield Road without looking to see if anyone was immediately behind? There can surely be only one answer to that question. The driver owed a duty to the boy, but he knew nothing of the mother; she was not on the highway; he could not know that she was at the window, nor was there any reason why he should anticipate that she would see his cab at all; he was not intending to go into Birstall Road except for the purpose of turning. I cannot see that the fact that she saw the tricycle under the cab distinguishes this case from *Bourhill* v. *Young.*[11]

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[7] [1943] A.C. 92, 98, 99.

[8] Ibid. 102.

[9] Ibid. 104.

[10] 1941 S.C. 395, 429.

It would appear that the judgment of the Court of Appeal in *Owens* v. *Liverpool Corporation*[12] was not looked upon favourably in *Bourhill* v. *Young* (see *per* Lord Thankerton[13]), though I confess that I should have thought that, if the driver of a tramcar negligently drove his tramcar against a hearse and overturned the coffin therein, he would be under a duty towards those in a coach immediately following the hearse. Lord Wright said[14]: "The lawyer likes to draw fixed and definite lines and to ask "where the thing is to stop. I should reply that it should stop "where in the particular case the good sense of the jury or the "judge decides. I should myself be disposed, as at present "advised, to say that it should have stopped short of judgment "for the plaintiff in *Owens* v. *Liverpool Corporation.*"[15] Lord Wright was there considering a case in which the Deputy Presiding Judge had found the facts in favour of the plaintiffs, but had held, following earlier authority, that the plaintiffs could not recover as they themselves were not in danger of personal injury, and on this the Court of Appeal held that he was wrong and that the plaintiffs were entitled to judgment. Counsel for the corporation in *Owens* v. *Liverpool Corporation*[15] had advanced the argument that no duty was owed by the tramcar driver to the passengers in the coach, but this point was not considered in the judgment of the court, which was given by MacKinnon L.J.[16]

The decision of this court in *Hambrook* v. *Stokes Brothers*[17] was not directly overruled by the House of Lords in *Bourhill* v. *Young*[18]; indeed it could not be, for in *Hambrook* v. *Stokes Brothers*[19] there was an admission of negligence which presupposed the existence of a duty towards the plaintiff. Atkin L.J., however, considered that case apart from the question of pleading, and his judgment,[20] if I may humbly say so, commends itself to me. He, however, was considering a case which on its facts is far removed from the present. In that case the mother, who died from the shock some time later, was on the highway —a narrow road—not far from the scene of an accident to one of her children.

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[11] [1943] A.C. 92.

[12] [1939] 1 K.B. 394; 55 T.L.R. 246; [1938] 4 All E.R. 727.

[13] [1943] A.C. 92, 100.

[14] Ibid. 110.

[15] [1939] 1 K.B. 394.

[16] Ibid. 397.

[17] [1925] 1 K.B. 141; (1925) 41 T.L.R. 125.

[18] [1943] A.C. 92.

[19] [1925] 1 K.B. 141.

[20] Ibid. 152.

The decision of the House of Lords in *Bourhill* v. *Young*[21] shows that the test in such cases is whether the driver could reasonably have foreseen any damage to the plaintiff; unless he could, it was said, no duty was owed to her, and consequently there was no negligence vis-à-vis the plaintiff. I find it difficult to draw a distinction between damage from physical injury and damage from shock; prima facie, one would think that, if a driver should reasonably have foreseen either, and damage resulted from the one or from the other, the plaintiff would be entitled to succeed. It is, however, unnecessary to consider this somewhat academic point for the purposes of this appeal for, on the finding of McNair J., no reasonable driver (or hypothetical bystander) would have anticipated damage of any kind to the plaintiff. That is a finding of fact with which this court ought not to interfere. Moreover, it is in accord with common sense. McNair J., towards the end of his judgment, said: "The mother, in my judgment, "was wholly outside the area or range of reasonable anticipation, "and if I am asked where the line is to be drawn, I should "humbly reply in the language of Lord Wright,[22] used admittedly "in a slightly different context, that it should be drawn 'where "'in the particular case the good sense of the jury or judge "'decides.' It seems to me to be contrary to common sense to "say that a taxicab driver ought reasonably to have contemplated "that, if he backed his taxi without looking where he was going, "he might cause injury by shock, or any other injury, to a woman "in a house some 70 or 80 yards away up a side street." There is indeed a sense of remoteness in this case.

In my opinion the appeal should be dismissed.

Denning L.J. In this case a taxicab driver negligently backed his cab without looking where he was going and ran into a small boy on a tricycle. His mother, who was in her home 70 or 80 yards away, heard him scream and, looking out of the window, saw his peril. She suffered nervous shock, and the question is whether she can recover damages on that account.

Mr. Paterson put the case on her behalf quite simply. His first proposition was that the taxicab driver was under a duty to drive his cab with reasonable care, and that he owed that duty to everyone in the vicinity, not only to people in physical danger, but also to those in emotional danger—particularly to a mother who was put in fear for her children's safety. For this proposition he relied on *Hambrook* v. *Stokes Brothers.*[23] His next proposition was that the taxicab driver by his negligence was in breach of that duty and was liable for all the direct consequences of the breach, whether they could reasonably have been foreseen or not. For this proposition he relied on *In re Polemis and Furness, Withy & Co. Ld.*[24]

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[21] [1943] A.C. 92.

[22] [1943] A.C. 92, 110.

If the two cases on which Mr. Paterson relied stood alone, they would be sufficient to warrant a decision in favour of the mother; but they have to be read in the light of the case of the Edinburgh fish-wife, *Bourhill* v. *Young.*[25] In that case the negligence of a motor-cyclist brought about a collision which so upset a fish-wife (who was standing nearby) that she suffered a miscarriage. She was held not entitled to recover. It seems to me that each member of the House of Lords based his decision on the ground that the motor-cyclist could not reasonably have been expected to have foreseen that the fish-wife would suffer injury by emotional shock. The test applied was not foreseeability of physical injury, but foreseeability of emotional shock. It would, I suppose, be open to this court to apply that test uncritically in the present case, and for us to ask ourselves simply whether the taxicab driver could reasonably have foreseen that the mother might suffer nervous shock. But I do not think that we can quite do that. We have to try to reconcile *Bourhill* v. *Young*[25] with *Hambrook* v. *Stokes Brothers*[26] particularly in regard to the duty of the driver. In *Hambrook* v. *Stokes Brothers*,[26] the case of the runaway lorry, Atkin L.J. held that, apart from the admissions in the pleadings, the lorry driver was in breach of his duty to the mother, although she was not herself in any personal danger; whereas in *Bourhill* v. *Young*[27] the House of Lords held that the motor-cyclist was guilty of no breach of duty to the fish-wife.

I am not sure that the whole difficulty does not arise because of the different senses in which we speak of the duty of care. Take the case of the fish-wife. Although the House of Lords held that the motor-cyclist was under no duty to her, that must mean that he owed her no duty in regard to emotional shock. It cannot mean that he did not owe her a duty in regard to physical injuries if it had so happened that she had suffered any. In that regard he was clearly under a duty to her to drive with reasonable care. Suppose, for instance, that his negligence had caused her to be physically injured in some way or other. This was admittedly improbable, but it was not altogether outside the realms of possibility. She was standing at a point where she might conceivably have been struck. The excessive speed of the motor-cyclist existed before the impact. He was not to know what vehicles would appear in his path. He might have collided with some other negligent car coming in some other direction, and as a result of the collision one or other of the vehicles might have been flung back on to her. One can never tell how vehicles will finish up after an accident. The risk of her being struck might be remote, but no matter how remote it was, and no matter how much it was outside the contemplation of the cyclist, nevertheless if the fish-wife had actually been struck as a result of his negligence, or of the negligence of him and others, she would have a cause of action in damages against him.

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[23] [1925] 1 K.B. 141.
[24] [1921] 3 K.B. 560.
[25] [1943] A.C. 92.
[26] [1925] 1 K.B. 141.
[27] [1943] A.C. 92.

So also with the case of the funeral procession, *Owens* v. *Liverpool Corporation.*[28] The mourners were not actually struck, but they were well within the area where they might have been. If their own carriage had been going a little faster it might have become itself involved in the accident by having to pull up suddenly or to swerve, with the consequent physical injury to the mourners, in which case they would clearly have had a cause of action for damages.

What is the reasoning which admits a cause of action for negligence if the injured person is actually struck, but declines it if he only suffers from shock? I cannot see why the duty of a driver should differ according to the nature of the injury. I should have thought that every driver was under a plain duty which he owed to everyone in the vicinity. He ought to drive with reasonable care. If he drives negligently with the result that a bystander is injured, then his breach of duty is the same, no matter whether the injury is a wound or is emotional shock. Only the damage is different. The bystander may be so close as to be put in fear for himself, or he may be just a little way off and be shocked by fear for the safety of others. In either case he has been injured by the driver's negligence. If you view the duty of care in this way, and yet refuse to allow a bystander to recover for shock, it is not because there was no duty owed to him, nor because it was not caused by the negligence of the driver, but simply because it was too remote to be admitted as a head of damage.

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[28] [1939] 1 K.B. 394.

A different result is reached by viewing the driver's duty differently. Instead of saying simply that his duty is to drive with reasonable care, you say that his duty is to avoid injury which he can reasonably foresee, or, rather, to use reasonable care to avoid it. Then you draw a distinction between physical injury and emotional injury, and impose a different duty on him in regard to each kind of injury, with the inevitable result that you are driven to say there are two different torts—one tort when he can foresee physical injury, and another tort when he can foresee emotional injury. I do not think that that is right. There is one wrong only, the wrong of negligence. I know that damage to person and damage to property are for historical reasons regarded as different torts; but that does not apply to physical injury and emotional injury. Lord Wright clearly treated impact and shock as one cause of action when he said in *Bourhill* v. *Young*[29]: "The man who negligently allows a "horse to bolt, or a car to run at large down a steep street, or "a savage beast to escape is committing a breach of duty "towards every person who comes within the reach of foreseeable "danger, whether by impact or shock."

The true principle, as I see it, is this: Every driver can and should foresee that, if he drives negligently, he may injure somebody in the vicinity in some way or other; and he must be responsible for all the injuries which he does in fact cause by his negligence to anyone in the vicinity, whether they are wounds or shocks, unless they are too remote in law to be recovered. If he does by his negligence in fact cause injury by shock, then he should be liable for it unless he is exempted on the ground of remoteness. This principle is the same as that stated by Sir Frederick Pollock in his book on Torts, 13th ed., p. 451 (or 15th ed., p. 334): "Everyone is bound to exercise due care towards "his neighbours in his acts and conduct, or rather omits or falls "short of it at his peril; the peril, namely, of being liable to "make good whatever harm may be a proved consequence of "the default." If this principle is correct, the only consequences for which he is excused are those which are too remote.

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[29] [1943] A.C. 92, 109.

Howsoever that may be, whether the exemption for shock be based on want of duty or on remoteness, there can be no doubt since *Bourhill* v. *Young* [30] that the test of liability for shock is foreseeability of injury by shock. But this test is by no means easy to apply. The test is not what the negligent party himself could reasonably have foreseen, for he rarely has time to foresee anything. The test is what a "hypothetical reasonable "observer could reasonably have foreseen": see *Bourhill* v. *Young*,[31] *per* Lord Wright. But where must this hypothetical observer be situate? In the driver's seat, or in an observation post on high? It is obvious that much must depend on his powers of observation and the scope of his imagination. One judge may credit him with more foresight than another. One judge may think that he should have foreseen the shock. Another may not. In both *Hambrook* v. *Stokes Brothers* [32] and *Chester* v. *Waverley Corporation* [33] the judges were divided in opinion on the question whether the shock to the mother could reasonably have been foreseen. Some cases seem plain enough. A wife or mother who suffers shock on being told of an accident to a loved one cannot recover damages from the negligent party on that account. Nor can a bystander who suffers shock by witnessing an accident from a safe distance: *Smith* v. *Johnson* (unreported), cited in *Wilkinson* v. *Downton* [34]; *Bourhill* v. *Young*,[35] *per* Lord Porter. But if the bystander is a mother who suffers from shock by hearing or seeing, with her own unaided senses, that her child is in peril, then she may be able to recover from the negligent party, even though she was in no personal danger herself: *Hambrook* v. *Stokes Brothers*.[36] Lord Wright said that he agreed with that decision. So do I.

This brings me to the real question: Is the present case covered by *Hambrook* v. *Stokes Brothers* [36] or not? I think that we should follow *Hambrook* v. *Stokes Brothers* [36] so far as to hold that there was a duty of care owed by the taxi driver not only to the boy, but also to his mother. In that case the negligence took place 300 yards from the place where the mother was standing. In this case it was only 70 or 80 yards. In that case the mother was not herself in any personal danger. Nor was she here. In that case she suffered shock by fear for the safety of her children from what she saw and heard. So did she here. In that case the mother was in the street, and in this case at the window of the house. I do not think that makes any difference. Nevertheless, I think that the shock in this case is too remote to be a head of damage. It seems to me that the slow backing of the taxicab was very different from the terrifying descent of the runaway lorry. The taxicab driver cannot reasonably be expected to have foreseen that his backing would terrify a mother 70 yards away, whereas the lorry driver ought to have foreseen that a runaway lorry might seriously shock the mother of children in the danger area.

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[30] [1943] A.C. 92.
[31] Ibid. 111.
[32] [1925] 1 K.B. 141.
[33] (1939) 62 C.L.R. 1.
[34] [1897] 2 Q.B. 57.
[35] [1943] A.C. 92, 117.
[36] [1925] 1 K.B. 141.

I may mention that some years ago, shortly after *Bourhill* v. *Young* [37] was reported, I tried a case at the Manchester Assizes where a woman, cutting a loaf of bread, found a dirty finger-stall in it. She suffered shock from the sight of it, and claimed damages from the baker. She did not make the contract with the baker, but he clearly was under a duty of care to her which he had broken. I held that she could not recover for the shock, because it could not reasonably have been foreseen. That case shows the difficulty of drawing the line. If she had eaten the loaf and been poisoned, she could have recovered damages, but because she was only shocked by sight, she could not. Where is the line to be drawn? Only where "in the "particular case the good sense of the judge decides." That is how Lord Wright put it in *Bourhill* v. *Young*,[37] and I do not think we can get any nearer than that.

I agree that the appeal should be dismissed.

Hodson L.J. The appellant's claim is for shock sustained owing to the negligence of the respondent, a taxicab driver, who ran into and injured her infant son who was playing in the street some little way from her house.

The appellant, while in the house, heard a scream which she identified as that of her son. She saw the taxicab backing on to a tricycle and saw the tricycle under the taxicab, but could not see the boy. She ran down the road, the boy ran towards her and she took him indoors. McNair J. found that the negligence of the defendant caused the injury to the boy, and the mother's shock was caused by what she saw and heard, but dismissed her claim on the ground that the driver could not reasonably have anticipated that to back his taxicab in the way he did, admittedly negligently vis-à-vis the small boy, would cause injury to his mother in her home 70 or 80 yards away.

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[37] [1943] A.C. 92.

The law in shock cases where no direct contact is involved was considered by the House of Lords in *Bourhill* v. *Young*.[37] It is clear that the action will lie for injury by shock whenever a person is placed in reasonable fear of immediate injury to himself, provided that the defendant could reasonably have foreseen the risk and ought to have guarded against it. As Lord Russell said[38]: "In considering whether a person owes to "another a duty a breach of which will render him liable to that "other in damages for negligence, it is material to consider what "the defendant ought to have contemplated as a reasonable "man." The difficulty lies in applying the law and in determining the range of the action. On the authorities it is at least doubtful whether it can extend to unintentional acts causing shock where there is no fear of personal injury to the plaintiff. Speaking, if I follow him correctly, of the range of the action, Lord Wright in *Bourhill* v. *Young*[39] was not prepared to impose any exact limit upon it, saying that it should be where in the particular case the good sense of the judge or jury should decide.

As McNair J., in the case now under appeal, directed himself in accordance with the speeches in *Bourhill* v. *Young*,[39] and arrived at the conclusion that the injury to the boy's mother was outside the range of the reasonable anticipation of the taxicab driver, I think that an appellate court should hesitate long before disturbing his conclusion.

The appellant contends that, since she has proved the negligent driving of the defendant and injury by shock to have been caused thereby, the case is on all fours with and, indeed, stronger than *Hambrook* v. *Stokes Brothers*,[40] in which the Court of Appeal, by a majority, found that a husband was entitled to recover in an action under the Fatal Accidents Acts where the death of his wife was caused by shock brought about by fear for her child's safety. That case, it is said, was not overruled by *Bourhill* v. *Young*,[41] and, accordingly, McNair J. was wrong in directing himself by the speeches delivered in the House of Lords with regard to the earlier decision.

This criticism is, I think, ill-founded. In *Bourhill* v. *Young*[41] their Lordships had to deal with a case in which no breach of duty was admitted, while in *Hambrook* v. *Stokes*

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[37] [1943] A.C. 92.

[38] [1943] A.C. 92, 101.

[39] [1943] A.C. 92.

[40] [1925] 1 K.B. 141.

[41] [1943] A.C. 92.

Brothers[42] there was an admission of negligence, so that the question of breach of duty did not arise.

It seems to me that, in the absence of the admission, Lord Thankerton would not have approved the decision in *Hambrook* v. *Stokes Brothers*.[42] He quoted a passage from Atkin L.J.'s judgment[43]: "'I agree that in the present case the plaintiff "'must show a breach of duty to her, but this she shows by "'the negligence of the defendants in the care of their lorry. "'I am clearly of opinion that the breach of duty to her is "'admitted in the pleadings,'" and continued: "But there "are certain obiter dicta on the question of duty, which might "be considered too wide, and I reserve any opinion on them." Lord Russell of Killowen preferred the dissenting judgment of Sargant L.J.; Lord Macmillan reserved his opinion upon the case; Lord Wright said that, as at present advised, he agreed with the decision; and Lord Porter expressed no dissent, emphasizing that all the Lords Justices were careful to point out that the vital problem was the extent of the duty and not the remoteness of damage, a view with which he agreed.

In these circumstances, although I think that it is difficult to draw a valid distinction on the facts between this case and *Hambrook* v. *Stokes Brothers*,[44] I think that McNair J. was entitled to treat the decision of the majority of the Court of Appeal in the way in which he did, for the reasons which he gave and for those which can be extracted from the speeches to which I have referred in *Bourhill* v. *Young*.[45]

I agree that the appeal should be dismissed.

Appeal as to damages for infant plaintiff dismissed.

Appeal on claim of mother dismissed.

Solicitors: *Darracotts; Alfred E. Johnson.*

E. D.

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[42] [1925] 1 K.B. 141.

[43] [1943] A.C. 92, 100; [1925] 1 K.B. 141, 156.

[44] [1925] 1 K.B. 141.

[45] [1943] A.C. 92.

CAMPBELL *v.* THOMPSON AND ANOTHER.

1953
Mar. 3, 4.

Pilcher J.

[1950 C. No. 1848.]

Practice and Procedure—Parties—Members' club—Tort—Negligence—Two members "sued on their own behalf and on behalf of all the "other members of the" club—Representation order—"Common "interest"—Order restricted to members of club at date of tort—R.S.C., Ord. 16, *r.* 9.

The plaintiff, a former employee of an unincorporated members' club, in an action for damages for personal injuries sustained in a fall on the club premises, sued two members of the club, the honorary assistant secretary and the chairman of the house committee, "on "their own behalf and on behalf of all the other members of the" club. She alleged negligence and breach of duty by the defendants as her employers and as occupiers of the premises. On an application for a representation order under R.S.C., Ord. 16, r. 9:—

Held, that, as all the members of the club had, both as employers and as technical occupiers of the club premises, the same common interest in resisting the plaintiff's claim, and as the two defendants were persons who could fairly be taken as representing the body of the club members, a representation order might be made. The only members, however, who could properly be sued in the proceedings were those persons who were members of the club at the time of the plaintiff's fall, and the order to be made must, therefore, be restricted to such persons.

Mercantile Marine Service Association v. *Toms* [1916] 2 K.B. 243, considered.

ACTION.

In June, 1949, the plaintiff was employed as a cleaner by the City Livery Club, an unincorporated members' club. She brought an action for damages for personal injuries sustained on June 29, 1949, when, she alleged, whilst in the course of her employment descending stairs leading from the ground floor to the basement of the club premises, she slipped on some grease and fell to the bottom of the stairs. The two defendants appearing on the record were the assistant honorary secretary and the chairman of the house committee, both members of the club, whose names were supplied by those acting on behalf of the club in answer to an inquiry by the plaintiff's solicitors as to whom she could sue. By her writ the plaintiff sued the defendants "on their own behalf and on behalf of all the other members of "the City Livery Club," and by her statement of claim she alleged that at all material times the defendants were the occupiers of the club premises where she was employed by them and that her fall and injuries were due to the negligence and/or breach of duty of the defendants. The defendants denied liability and alleged contributory negligence.

At the commencement of the hearing the court was invited to make a representation order in appropriate form under R.S.C., Ord. 16, r. 9.[1] The case is reported only on that point.

F. H. Lawton for the defendants. The City Livery Club is an unincorporated members' club. This is a matter which might affect all the members of the club, and although in fact acting on behalf of Lloyd's underwriters, the defendants' solicitors' first duty, according to *Groom* v. *Crocker*,[2] is to protect the members of the club. Both the club and their insurers are anxious to see justice done and do not wish to escape liability or to take technical points, but in view of the observations made in *Adams* v. *Naylor*[3] it is essential that, however willing the defendants are to appear and answer a claim, the parties to the action should be properly named and described; the objection must be made in this case that the pleadings are not in order.

Stephen Stewart for the plaintiff. If this were an action in contract there would be no difficulty because judgment would be obtained against a common fund. The plaintiff's claim is in tort and there are four possible courses open to her; she may (1) sue the club in its own name, or (2) sue the officers or the committee of the club, or (3) apply for a representation order under R.S.C., Ord. 16, r. 9, or (4) sue all the members of the club, that is, all who were members at the time of her accident.

The membership of the club is approximately 2,300, so that the fourth course is impracticable. The first course is also excluded, on the authority of *London Association for Protection of Trade* v. *Greenlands Ld.*[4] A members' club or an association is a loose form of association of individuals without a legal entity which cannot be sued in its own name. Lord Parker said[5]: "The London Association for the Protection of

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[1] R.S.C., Ord. 16, r. 9: "Where "there are numerous persons having "the same interest in one cause or "matter, one or more of such persons "may sue or be sued, or may be "authorized by the court or a judge "to defend in such cause or matter, "on behalf or for the benefit of all "persons so interested."

[2] [1939] 1 K.B. 194; 54 T.L.R. 861; [1938] 2 All E.R. 394.

[3] [1946] A.C. 543; 62 T.L.R. 434; [1946] 2 All E.R. 241.

[4] [1916] 2 A.C. 15; 32 T.L.R. 281.

[5] Ibid. 38.

"Trade is not a corporate body, nor is it a partnership, nor "again is it a creation of statute. The plaintiffs were wrong in "making it a defendant to the action." He went on to say that he considered it to be a matter of substance and that had application been made for leave to defend on behalf of all the members the court would have had to inquire whether all the members had a common interest within Ord. 16, r. 9, and that they might have separate defences.

[PILCHER J. The point there was whether the members were responsible for the tortious act of the secretary.]

The possibility of a secretary being sued in tort was not ruled out in that case; although an order was made to strike out the association as a defendant it was not said that it was wrong to sue the secretary and that was never argued. The principle appearing from that case is merely that an association, or a club, cannot be sued, and that if the members are sued individually only those who were members at the time of the act complained of may be parties to the action. Lord Parker said[6]: "Lastly, "if an order could have been made at all it must have been "confined to authorizing Sir Samuel Scott to defend on behalf "of himself and those who were members of the association at "the date of the alleged libel. Those who had become members "since that date could not be liable at all." It is submitted that in the present case there can be no objection to suing the secretary or the two defendants; the defendants have not been selected at random from amongst the members of the club; their names were supplied by those acting for the club. [*Hardie & Lane Ld.* v. *Chiltern*[7] referred to.]

[PILCHER J. Why may a representation order not be made if it is restricted to the members at the date, and possibly the time, of the accident?]

It is conceded that such an order would have to be so restricted. It is necessary to satisfy the court that all those members had a "common interest" in the cause or matter at the time of the commission of the tort: see the White Book, 1953 edition, at page 249, and Halsbury's Laws of England, 2nd edition, Vol. 4, at pages 503 and 504. In *Brown* v. *Lewis*[8] it was held that members of the committee of the Blackburn Rovers Football Club were personally liable for the results of the collapse of a stand, but that case does not take the matter any further. The club's liability to the plaintiff is that of an employer and therefore higher than that of an occupier.

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[6] [1916] 2 A.C. 15, 39.

[7] [1928] 1 K.B. 663; 43 T.L.R. 470.

[8] (1896) 12 T.L.R. 455.

The authorities are not of much assistance on this point; the majority of cases concern trade unions prior to the Trade Disputes Act, 1906, but the distinction between contract and tort in this respect is clearly shown by the remarks of Swinfen Eady L.J. in *Mercantile Marine Service Association* v. *Toms*.[9] It seems that that difference is due to the fact that the rule, now Order 16, r. 9, was originally evolved and applied in the Chancery Division and was not therefore required to be applied in an action where the remedy was damages; now that the rule has been extended to all divisions of the High Court it is submitted that there is no reason why there should still be a distinction between contract and tort in respect of its application. *Mercantile Marine Service Association* v. *Toms*[10] is referred to in textbooks as authority for the proposition that a representation order cannot be made in tort; it is submitted that that case was decided on its own facts and leaves the point open. Swinfen Eady L.J. referred[11] to dicta in *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants*,[12] where Lord Macnaghten said[13]: "I have no doubt whatever that a trade "union, whether registered or unregistered, may be sued in a "representative action if the persons selected as defendants be "persons who, from their position, may be taken fairly to "represent the body."

In view of *London Graving Dock Co. Ld.* v. *Horton*[14] the members' function as occupiers of the club premises can be disregarded; the question is who, on behalf of all the members, employed the plaintiff. It is not contested that the two defendants represent the club, and it is submitted that the only question is whether the pleadings can stand as they are or whether a representation order should be made. If the latter, there is nothing to prevent the order being made at this stage.

F. H. Lawton for the defendants.

[His Lordship intimated that he would be prepared to make a representation order.]

Stephen Stewart applied for an order under Ord. 16, r. 9, directing that the two named defendants be appointed to represent all the persons who were members of the City Livery

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[9] [1916] 2 K.B. 243, 246, 247.

[10] [1916] 2 K.B. 243.

[11] Ibid. 248.

[12] [1901] A.C. 426; 17 T.L.R. 698.

[13] Ibid. 438.

[14] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

Club on June 29, 1949, and for leave to amend the pleadings accordingly.

PILCHER J. I will allow the application and give my reasons when I give judgment in the case.

Stephen Stewart then opened the case on the facts.

PILCHER J. In June of 1949 the plaintiff, Mrs. Rose Florence Campbell, was employed as a cleaner at the City Livery Club, who are the occupiers of premises at 5 New London Street, E.C.3. The City Livery Club is what is known as a members' club, and the defendants appearing on the record when the case was opened were H. R. Thompson and C. G. Surtees Shill, who were stated to be sued "on their own behalf and on behalf of all "other members of the City Livery Club." Thompson is in fact the assistant honorary secretary of the club and he is also a member of the club. Shill was at the material time, and for aught I know still is, the chairman of the house committee of the club.

A members' club is an association of persons, an unincorporated body, which has no legal entity. When the case was called I was very properly informed by Mr. Lawton, who appeared for the defendants, that the City Livery Club was in fact insured under some appropriate policy by Lloyd's underwriters against claims of the type which the plaintiff is making in this action. Mr. Lawton made it clear that his clients, whoever they might be, had no desire to take any technical point or to avoid any proper legal liability which lay upon them. He stated that he was merely anxious, and so, indeed, was Mr. Stewart, who appeared for the plaintiff, that there should be no doubt that the defendants were properly named and described in the title to this action.

In the well known case of *Adams* v. *Naylor* [1] it was made clear by the House of Lords that, however friendly the parties to proceedings might be, and however anxious and willing the defendants might be to appear and answer a claim made by the plaintiff, it was essential that they should be properly named or properly described in the writ and in the proceedings in the action. Viscount Simon in that case said [2]: "The courts before whom "such a case as this comes have to decide it as between the "parties before them and have nothing to do with the fact that "the Crown stands behind the defendant." *Adams* v. *Naylor* [3] was a case where the defendant was a nominal defendant whose name had been given by the appropriate government department as a suitable defendant to the particular action, it being appreciated that in fact the government stood behind him. Viscount Simon went on[4]: " For the plaintiffs to succeed, apart from the statute, " they must prove that the defendant himself owed a duty of " care to the plaintiffs and has failed in discharging that duty." There is also a passage in Lord Uthwatt's speech, in which he said[5]: " The noble and learned Lord on the woolsack has " emphasized that the establishment of a duty owed by the " defendant to the plaintiffs was essential to the plaintiffs' " success in the action and, with my noble and learned friend, " Lord Simonds, I express my complete concurrence with his " observations. It was not open to the parties to this suit by " agreement to have the matter dealt with on the footing, proved " to be false, that the defendant was in occupation of the land in " question."

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[1] [1946] A.C. 543; 62 T.L.R. 434; [1946] 2 All E.R. 241.

[2] [1946] A.C. 543, 550.

[3] [1946] A.C. 543.

Having regard to the observations made in *Adams* v. *Naylor*,[6] counsel in this case were anxious that the defendants should be properly described. The plaintiff's claim here is in tort and is founded on an alleged breach of duty by the members of the City Livery Club as a body in failing to take reasonable care through their appropriate officers or servants for her safety, either in her quality as a servant of the members of the club or in that of an invitee to the club premises, of which the members are occupiers.

No application had been made by the plaintiff under Ord. 16, r. 9, to allow the named defendants to be sued in their representative capacity. [His Lordship read the rule and continued:] Counsel for the plaintiff, with, I think, the full support of counsel for the defendants, accordingly, before the case began, invited me to entertain an application under rule 9, and to authorize one or more of the named defendants to defend the case in a representative capacity on behalf of all the other members of the club. In this connexion I was referred to Halsbury's Laws of England, vol. IV, paragraph 931, which deals with the position of members of a club. The material words are as follows:— " The question how far the members of a club are liable in tort " for the wrongful acts and omissions of the committee, or of " officers or servants of the club, is one in regard to which there " is practically no authority. In the case of proprietary and

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[4] [1946] A.C. 543, 550.

[5] Ibid.

[6] [1946] A.C. 543.

"incorporated clubs, it would seem that the ordinary rules as to "the liability of a master or principal for the torts of his servants "or agents apply. As to unincorporated members' clubs, the "only reported case is one where the committee of a football "club had employed an incompetent person to repair a stand for "the accommodation of visitors to view matches, and a visitor, "who had sustained injury by the collapse of the stand, brought "an action for damages against the committee as representing "the whole club. The county court judge at the trial amended "the claim, and gave judgment against the members of the "committee personally, and on appeal the judgment was "affirmed, on the ground that the members of the committee "were the persons primarily liable." It will therefore be seen that the case to which reference is made in that paragraph, namely, *Brown* v. *Lewis*,[7] is really of no assistance to me in the present case.

I am well satisfied in the present instance that all the members of the City Livery Club have both as employers of the plaintiff and as technical occupiers of the club premises the same common interest in resisting the plaintiff's claim. I am told that the club membership is about 2,500. It is clear that as a practical matter it would be impossible to have 2,500 defendants, and it is equally clear that the club cannot be sued by name. For this latter proposition I was referred to *London Association for Protection of Trade* v. *Greenlands Ld.*[8]

Another matter which is clear is that the only members of the club who can properly be sued by the plaintiff in these proceedings are those persons who were members of the club at the time of the plaintiff's accident on June 29, 1949. It is a fact, as stated in the passage from Halsbury's Laws of England which I have just read, that there is no authority, or no direct authority, as to how far the members of an unincorporated members' club are liable in tort. In this connexion I was referred to a passage in Lord Macnaghten's speech in the well-known case of the *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants*,[9] where he said: "Then, if trade unions are "not above the law, the only remaining question, as it seems "to me, is one of form. How are these bodies to be sued? "I have no doubt whatever that a trade union, whether registered or unregistered, may be sued in a representative action

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[7] 12 T.L.R. 455.

[8] [1916] 2 A.C. 15; 32 T.L.R. 281.

[9] [1901] A.C. 426, 438; 17 T.L.R. 698.

" if the persons selected as defendants be persons who, from their " position, may be taken fairly to represent the body."

I was also referred to *Mercantile Marine Service Association* v. *Toms.*[10] In that case the plaintiff association, which was one of the bodies to which ships' officers belonged for their own purposes—I think that it was in fact a trade union—sued three named persons, namely, Toms, Moore and Grace, in their personal capacity and on behalf of all other members of another merchant service officers' association called the Imperial Merchant Service Guild. The subject-matter of the action was libel, and it was therefore an action in tort, and the plaintiffs sought authority from the court under Ord. 16, r. 9, to sue the three named persons in the representative capacity which I have already indicated. The Court of Appeal, when the matter was taken there, refused to make any order on the ground that the general body of members of the guild had not the same common interest in resisting the particular proceedings which were being brought. Swinfen Eady L.J., in the course of his judgment, summarized the situation which obtained in the year 1915 with regard to suing defendants in a representative capacity in matters of tort. He said[11]: " I have great difficulty in seeing that in " this case there are numerous persons having the same interest " in this cause or matter within the meaning of the rule. The " action is for libel, and the plaintiffs must prove who published " the libel, and prima facie only those who have published it " either by themselves or by their servants or agents or have " authorized its publication are liable. The various members of " this association may be in a wholly different position." Then he elaborated that matter and proceeded[12]: " In my opinion " this rule " [i.e., rule 9 of Ord. 16] " is not intended to apply " to such a case as this. I think that the observation of " Lindley L.J. in *Temperton* v. *Russell*[13] is applicable to this " case where he says—I am paraphrasing it to make it applicable " to the present case—that the persons assumed to be represented by these three officers, the chairman, the vice-chairman, " and secretary, have no such interest as is contemplated by the " rule. I asked during the course of the argument whether there " is any authority in the case of an action of tort, because this is " pure tort, for the application of this rule, and no case has been " referred to, and so far as I know there is no case in the books

[10] [1916] 2 K.B. 243.

[11] Ibid. 246.

[12] Ibid. 247.

[13] [1893] 1 Q.B. 435, 438.

"in which it has been done. In *Wood* v. *McCarthy*[14] Wills J., "referring to the observation of Lindley L.J. on Ord. 16, r. 9, "in *Temperton* v. *Russell*,[15] said that the Lord Justice was "referring to the well-established practice in the Court of "Chancery, and was pointing out the distinction in that respect "between actions of contract and actions of tort. Lindley L.J., "in the passage referred to by Wills J., said this: 'This "'expression only extends, we think, to persons who have or "'claim some beneficial proprietary right, which they are "'asserting or defending in the cause or matter. The plaintiff "'in this case sues for damages, and the action . . . is founded "'on tort.' It is true that the limitation of the rule stated by "Lindley L.J., namely that the expression 'having the same "'interest in one cause or matter' only extends to persons who "have or claim some beneficial proprietary right which they are "asserting or defending in the cause or matter, has been "dissented from, and is no longer law. But apart from that "the decision in *Temperton* v. *Russell*[15] is good law. In *Wood* "v. *McCarthy*[16] Wills J. was of opinion that Ord. 16, r. 9, did "not apply to actions of tort, and I am not aware that the rule "has ever been applied in cases of the kind, and one can see "many reasons why it should not be so applied. The judgments "of Buckley L.J. and of Kennedy L.J. in *Walker* v. *Sur*[17] "illustrate this. There are, no doubt, dicta in *Taff Vale Ry. Co.* "v. *Amalgamated Society of Railway Servants*,[18] especially in "the speech of Lord Macnaghten, which indicate that in a proper "case it is possible that an order of that kind may be made; but "I am quite satisfied that the present case is not one of those "cases, and no order ought to be made here."

It will be seen from that passage from Swinfen Eady L.J.'s judgment that the question whether or not it is possible in an appropriate case to make an order for defendants to be sued in their representative capacity under Ord. 16, r. 9, in an action for tort, has given rise to some difference of judicial opinion. However, in this case I am quite satisfied that the two members of the City Livery Club whose names appear on the writ are persons who can fairly be taken, in the words of Lord Macnaghten, "to represent the body" of club members, and that they and all the other club members have a "common interest" in resisting the plaintiff's claim.

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[14] [1893] 1 Q.B. 775.

[15] [1893] 1 Q.B. 435.

[16] [1893] 1 Q.B. 775.

[17] [1914] 2 K.B. 930.

[18] [1901] A.C. 426.

1953

CAMPBELL
v.
THOMPSON.

Pilcher J.

In this case, therefore, I am prepared to make the order under Ord. 16, r. 9, which I have been invited to make. I do not think that it is too late in the circumstances for me to make it, and accordingly I do make it. I direct that the two named defendants be appointed to represent all the persons who were members of the City Livery Club on June 29, 1949; that is to say, on the date of the plaintiff's accident, and the writ and all other proceedings in the action will accordingly be amended by adding the words " on June 29, 1949," after the words " City Livery Club " in the description of the defendants.

Order accordingly.

[His Lordship then held, on the facts, that the plaintiff had failed to make out her case, and dismissed the action.]

Solicitors: *W. B. Blackwell & Co.; Kimbers, Williams, Sweetland & Stinson.*

J. F. L.

C. A.

MUIR *v.* JAMES.

1953
Jan. 27, 28.

Somervell, Birkett and Romer L.JJ.

Building—Licence—Additional gardening work—Not within licence—Covered by free allowance—" Services for a building "—" Road "—Emergency legislation—Defence Regulations, 1939, *No.* 56A *Sch. VI, Pt. II—Control of Building Operations* (*No.* 16) *Order*, 1951 (*S.I.* 1951, *No.* 1082), *art.* 3.

The plaintiff, a builder, undertook to build two garages at premises occupied by the defendant and his daughter. The premises were owned by the daughter, to whom a building licence had been issued. The plaintiff, on the instructions of the defendant, carried out certain other work, which included the preparation of a driveway to the garages. In an action against the defendant for the cost of that additional work, the defendant contended that, as there was no licence for the work, it had been carried out illegally in contravention of regulation 56A of the Defence (General) Regulations, 1939:—

Held, that, even assuming that the work was within the general words of the regulation, the free allowance under the Control of Building Operations Orders was available to cover it, on the principles laid down in *J. Dennis & Co. Ld.* v. *Munn* [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616, for the work was clearly ordered separately, and was not within the specification on which the licence was granted, and on the evidence it was

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

"executed separately"—although that did not appear to be necessary in spite of dicta of Denning L.J. in *J. Dennis & Co. Ld.* v. *Munn* [1949] 2 K.B. 332.

Semble, the regulations did not in any event apply to the work of preparing a driveway to a garage.

APPEAL from Judge Sir Gerald Hurst Q.C. sitting at Lambeth county court.

The plaintiff, a builder, had been employed as a member of a building firm in the conversion of a house at Sydenham into two flats, one of which was to be occupied by the defendant and the other by his daughter, who was the owner of the property. The plaintiff subsequently undertook, working on his own account, to erect two garages. In respect of the work of conversion and the building of the garages, licences were required and these were obtained by the daughter. In April and May, 1952, the plaintiff carried out other work in the garden, which he alleged that he had been instructed to do by the defendant. That work included some drainage work and also work in connexion with "cutting back garden beds and excavating over "the site to form a roadway to the garages, taking down and "rebuilding a dwarf burr wall, spreading and levelling and draining the hardcore to the roadway and clearing surplus excavated "material, taking out obsolete water main and repairing leaks "in the main service pipe."

In September, 1952, the plaintiff sued the defendant for the sum of £62 16s. 9d., which he alleged was due to him in respect of that work. The defendant denied that he owed the sum alleged and contended that he had given no instructions to the plaintiff to do the work; and that if the plaintiff had done the work it had been done on behalf of the defendant's daughter, the owner of the premises. Alternatively, he contended that the work had been done for the purpose of making good damage previously caused by the plaintiff or by employees of the firm which had carried out the original conversion and with which the plaintiff was associated. Finally, the defendant claimed that the work had been done without a building licence and was therefore illegal.

The county court judge gave judgment for the plaintiff for £46 8s. 8d., being the cost of garden work for which he held the defendant to be personally responsible. He found for the defendant on the claim for drainage work.

The defendant appealed on the grounds (1) that there was no evidence to justify the judge's decision that the defendant placed an order for the work either as a principal, or at all, or that he agreed to be personally responsible for payment for the work; and (2) that the judge was wrong in law in not deciding that the work was carried out illegally in contravention of regulation 56A of the Defence Regulations, 1939.[1]

The case is reported only on the second point.

P. Syrett for the defendant. A licence had been granted for building the garages, but other work in connexion with the building of the garages had been carried out and the total cost

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[1] Defence (General) Regulations, 1939, reg. 56A: "(1) Subject to the "provisions of this regulation the "execution in the United Kingdom, "for any purpose specified in the first "column of the Table set out in "Part I of the Sixth Schedule to "these regulations, of any operation "specified in Part II of that Schedule "begun after the sixth day of October, 1940, shall be unlawful except "in so far as it is authorized by the "authority specified in the second "column of the said Table: Provided "that . . ."

Para. (2): "Subject to the provisions of this regulation, the carrying out in the United Kingdom, "except for a purpose specified in the "first column of the Table set out in "Part I of the Sixth Schedule to these "regulations, of any work specified in "Part III of that Schedule or of any "maintenance work on a building or "on any such works as are mentioned "in Part II of that schedule, shall be "unlawful except in so far as there is "in force in respect thereof a licence "granted by the Minister: Provided "that the Minister may by order "authorize the carrying out of such "work without a licence within such "limits of cost as may be specified "in the order, and may prescribe "different limits of cost for different "classes of work or for different "classes of property or for different "areas, and any such order may, "without prejudice to the generality "of this provision, limit the cost of "the work, or of the work of any "class, that may be carried out in "any period specified in the order on "any single property as defined in "the order."

Part II of the Sixth Schedule to the regulation relates to "The construction, re-construction or alteration of "a building, of works required for the "purpose of providing water, light, "heating or other services for a building, . . . or of any other fixed works "of construction or civil engineering "including a road."

Part III of the Sixth Schedule relates to "Work done in the construction, re-construction, alteration "demolition, repair, or decoration of "a building or of any such works as "are mentioned in Part II of this "Schedule . . ."

"In this Part of this Schedule any "reference to work done in the repair "of a building or works includes a "reference to work done as a temporary measure pending the repair "thereof."

Control of Building Operations (No. 16) Order, 1951, art. 3: "Any person "may, without a licence from the "Minister of Works under para. (2) "of the said regulation 56A, carry out "on any single property during the "period beginning with the first day "of July, 1951, and ending with the "thirtieth day of June, 1952, any "work to which this article applies, "if the cost of the work together with "the cost of any other such work "previously carried out on that property during that period without "such a licence as aforesaid does not "exceed the sum of £100."

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of the work had exceeded the sum for which the licence had been granted. The work was therefore illegal.

[SOMERVELL L.J. There is authority for saying that if a person applies for a licence to build a house and a licence is granted for the expenditure of £2,000, if the actual cost of the house is £2,100 the person to whom the licence is granted cannot pray in aid the free allowance to excuse the spending of a further £100. The point in this case is whether, if a licence is obtained for the building of two garages, the cost of making a roadway to the garages comes within that principle or whether the roadway could properly be regarded as a separate item of work which could be carried out without a licence.]

Part II of Sch. VI to Regulation No. 56A expressly includes "other services to a building" and "a road." The work described in the bill of account—the preparation of a rough road leading to the garages—was part of, or so connected with, the garages as to be a service to the buildings within the meaning of that part of the Schedule, and it was therefore covered by the provisions of the regulation.

On the principles of *J. Dennis & Co. Ld.* v. *Munn* [2] when a licence had been obtained for certain work, and other work was carried out in addition to the work specified in the licence, the additional work could only be done without a licence if it was severable from the specified work—ordered separately and executed separately. This roadway had been brought into being as part of the original contract for building the garages and it had been executed at the same time as the work on the garages and it should not, therefore, have been held to be work which could be done within the full allowance provided for by the regulation.

D. S. Wright for the plaintiff was not called upon.

SOMERVELL L.J., having stated the facts, said that the first ground of appeal must fail, as there was evidence on which the judge could find that the defendant had ordered the work to be done and was liable as a principal. His Lordship continued: The second point which was taken fell really into two parts. Admittedly, there was no licence for this work. The judge held that it was what was described as "garden work." Mr. Syrett told us that he conceded below that if that was its proper description his point as to illegality would fail. The submission which was made to us, as it was made to the judge, was that this was work within the general provisions of regulation 56A of the Defence Regulations, 1939. It was further submitted that it should be treated, on the principle of *J. Dennis & Co. Ld.* v. *Munn*,[1] as work—I do not want to beg any question—which should be regarded as a part of, or so connected with, the building of the garage as not to be properly treated as covered by the provision as to the value of work that could be done without a licence. In *J. Dennis & Co. Ld.* v. *Munn* [1] a licence had been given for specified work. The builder, who, of course, knew about the licence, did not as a matter of fact know the amount for which the licence had been granted. He exceeded the amount of the licence in carrying out the specified work. It was sought to add on to the amount of the licence the amount of work which could be done free and without a licence. This court said that that could not be done. It is summarized in the headnote in this way: "The allowance of building work permitted without a written licence by virtue of the Control of "Building Operations (No. 8) Order, 1947 . . . , was only "permitted for work severable from specified work for which "a written licence had been obtained—work ordered separately "and executed separately."

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[2] [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616.

The first point on which the defendant failed before the judge was that he held that this work was not within the general controlling words of regulation 56A. His counsel relied on the words in Part II of Sch. VI, "services for a building" or possibly, "any other fixed works of construction or civil "engineering, including a road." I do not myself think that this work does come within the words "services for a building." I also would very much doubt whether it comes within the word "road," as it occurs in Part II. This work, as it seems to me, consisted of clearing away obstructions and making something of the character of a garden path sufficiently wide to take a motor-car. I would myself, at any rate, have doubted whether that was within the words of the regulation.

We have very incomplete information before us as to the work which was done, and I do not propose to base my decision on this part of the case on those considerations, because I have come to the conclusion that, assuming that it was within the general words, the free allowance is available to cover it on the principles laid down in *J. Dennis & Co. Ld.* v. *Munn*.[1] Clearly

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[1] [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616.

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it was ordered separately. It was plainly not within the specification on which the licence was obtained and, so far as I can gather from the evidence, it was "executed separately." I think that those latter words were taken from the judgment of Denning L.J.[2] I do not think that they occur in the other two judgments, and they do not seem to me to be necessary to the ratio of the decision, as it appears, indeed, from Denning L.J.'s judgment itself. I think myself that it might well be that work might fall outside the regulations on the principles laid down in *J. Dennis & Co. Ld.* v. *Munn* [1] if it were ordered separately and outside the licence specification although it were executed at the same time. As the matter has been referred to, I thought it right to say that I think that that point should be regarded as open.

For these reasons I would dismiss the appeal.

BIRKETT L.J. I do not think that there is anything I can say except to express my full agreement with the judgment which has just been delivered.

ROMER L.J. I also agree. I would like to associate myself with the observations which my Lord has made with regard to *J. Dennis & Co. Ld.* v. *Munn.*[1]

Appeal dismissed.

Solicitors: *Coulson & Coulson; Wilmer, Hives & Barron.*

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[1] [1949] 2 K.B. 327.

[2] Ibid. 332.

REEVES *v.* DEANE-FREEMAN.

[1949 R. No. 2869.]

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Jan. 30;
Feb. 2.

Somervell, Birkett and Romer L.JJ.

Limitation of Action—Public authority—Canadian soldier driving army truck on military duty—Accident—Injury to plaintiff—Claim against soldier—Action not begun within 12 months—Action not maintainable — Principle applicable to Commonwealth soldier serving in United Kingdom—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s* 21 (1)*—Visiting Forces (British Commonwealth) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 6), *s.* 2 (3) (*b*).

A soldier while driving an army lorry in the course of his military duties is a public authority engaged in a public duty and therefore entitled to the protection of section 21 of the Limitation

Act, 1939, so as to bar an action for damages for alleged negligence in the course of such driving brought against him by a member of the public after the lapse of one year from the date on which the cause of action accrued.

Greenwell v. *Howell* [1900] 1 Q.B. 535; 16 T.L.R. 235 applied.

The like principle is applied to a soldier of a Commonwealth force serving in this country by section 2 (3) (*b*) of the Visiting Forces (British Commonwealth) Act, 1933.

Decision of Lord Goddard C.J. [1952] W.N. 415; [1952] 2 T.L.R. 361; [1952] 2 All E.R. 506 affirmed.

Quaere, whether, apart from the Act of 1933, the same principle would apply to a soldier of a Commonwealth force.

APPEAL from Lord Goddard C.J.

On November 14, 1946, the plaintiff Reeves, while riding a motor-cycle in London, suffered injury by reason of a collision with a lorry belonging to the Canadian Army and driven by the defendant Deane-Freeman, a member of the British Sovereign's Canadian armed forces. The writ in the present action was not issued by the plaintiff until December 2, 1949, by which time the defendant had been demobilized for some time, and it was not served on him in British Columbia until March, 1950. The statement of claim was filed on July 20, 1950. On March 11, 1952, an order was made by Parker J. under Ord. 25, r. 2, that the questions of law raised by paragraph 4 of the defence should be set down for hearing forthwith. That paragraph pleaded section 21 of the Limitation Act, 1939 [1] (which replaced the Public Authorities Protection Act, 1893) and, in effect, alleged that the plaintiff's action was barred, because it had not been brought within 12 months of the happening of the accident and the defendant was at the time engaged in a public duty.

The preliminary point on pleadings came for hearing before Lord Goddard C.J. on July 15, 1952, and on July 23 he dismissed the action, holding that the defendant was protected by section 21 of the Limitation Act, and the action was barred. In a written judgment he said that the points which arose in the case were: (1) whether a soldier on duty was entitled to the protection of section 21 of the Limitation Act, 1939, as being a public authority engaged in a public duty; and (2) whether the Act in any case afforded protection to a member of the Canadian forces, even on the assumption that it would do so in the case of a member of the British forces. He would dispose of the second point at once by saying that in his opinion the matter was concluded in the defendant's favour by section 2 (3) (*b*) of the Visiting Forces (British Commonwealth) Act, 1933,[2] the object of which was to put members of the forces of the British Commonwealth, while in this country, in precisely the same position as members of the British forces. If, therefore, a home force was to be regarded as a public authority, a visiting force was equally to be so regarded. He would consider the position of an individual member of that force, but would say at once that it appeared to him that the defendant was entitled to rely on section 21 of the Limitation Act, 1939.

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[1] Limitation Act, 1939, s. 21 (1): "No action shall be brought against "any person for any act done in "pursuance, or execution, or intended "execution of any Act of Parliament, "or of any public duty or authority, "or in respect of any neglect or "default in the execution of any such "Act, duty or authority, unless it is "commenced before the expiration of "one year from the date on which "the cause of action accrued: Pro"vided that where the act, neglect "or default is a continuing one, no "cause of action in respect thereof "shall be deemed to have accrued, "for the purposes of this subsection, "until the act, neglect or default has "ceased."

The question how far a soldier on duty was entitled to rely on the Act did not appear to have been the subject of express decision in this country. In *Merlihan* v. *A. C. Pope Ld.*[3] it had not, apparently, been argued that the section did not apply in the case of a Canadian soldier, or that a soldier was not to be regarded as a public authority, and in *Hordern-Richmond* v. *Duncan* [4] it had been assumed that a sergeant in the British army was entitled to the protection of the section. *Wilson* v. *First Edinburgh City Royal Garrison Artillery and Lieutenant-Colonel Mackay* [5] and *The Danube II* [6] were concerned with officers, and it seemed to him impossible to contend that the army and its officers or the master of a tug towing a battle target were not public authorities. The question whether an individual could be a public authority within the meaning of the section was concluded in that court by the decision in *Greenwell* v. *Howell* [7] that the protection of the Public Authorities Protection Act, 1893, extended to officers of a public body and to persons acting under their express mandate.

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[2] Visiting Forces (British Commonwealth) Act, 1933, s. 2 (3): "Subject as hereinafter provided, any "enactment (whether contained in "the Naval Discipline Act, the Army "Act, the Air Force Act or any other "statute) which (*a*) exempts, or pro-"vides for the exemption of, any "vessel, vehicle, aircraft, machine or "apparatus of, or employed for the "purposes of, the home forces or any "of them from the operation of any "enactment; or (*b*) in virtue of a con-"nection with the home forces or any "of them, confers a privilege or "immunity on any person . . . shall, "with any necessary modifications, "apply in relation to a visiting force "as it would apply in relation to a "home force of a like nature to the "visiting force."

[3] [1946] 1 K.B. 166; 61 T.L.R. 508; [1945] 2 All E.R. 449.

[4] [1947] 1 K.B. 545; 63 T.L.R. 193; [1947] 1 All E.R. 427.

[5] (1904) 7 S.C. 168.

[6] [1921] P. 183; 37 T.L.R. 421.

If, therefore, the army was a public authority, as in his opinion it was, and if the soldier concerned was acting under the direct orders of his officer and engaged on public duty, he was entitled to the protection which the Act gave. In the present case the defendant was on a journey from the army garage to Waterloo station for duty in connexion with the railway transport officer, and his journey had been authorized by the officer commanding the transport company. It was clear that the journey was one which he was required by his military duty to undertake, and was in connexion with army service. That being so, the defendant was protected by section 21 of the Limitation Act and accordingly the action failed.

The plaintiff appealed.

H. Vester and *R. J. Harvey* for the plaintiff. It is clear from the order made by Parker J. that it was being contended that the fact that the defendant was serving in the Army was sufficient to bring him within the Limitation Act, 1939, replacing the Public Authorities Protection Act, 1893. The Lord Chief Justice did not so find, and it is submitted that it is only a public authority which is protected.

[SOMERVELL L.J. *Greenwell* v. *Howell* [8] decided that the protection was extended to officers of a public authority.]

Doubt has been thrown on that case by decisions of the House of Lords. In *Wilson* v. *First Edinburgh City Royal Garrison Artillery* [9] the officer in charge of the regiment was held to be protected, and in *The Danube II* [10] it was extended to the officer in charge of an Admiralty tug; but those cases are a far cry from the case of a private soldier driving a lorry. The Act of 1893 does not apply to a Canadian soldier, but only to public authorities within the jurisdiction of the legislature which passed the statute. The public duty referred to is a public duty owed within the jurisdiction of the British Parliament and not to some body outside that jurisdiction. There is no presumption that the statute has extraterritorial effect.

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[7] [1900] 1 Q.B. 535; 16 T.L.R. 235.

[8] [1900] 1 Q.B. 535.

[9] 7 S.C. 168.

[10] [1921] P. 183.

[SOMERVELL L.J. A Canadian soldier owes a duty to the Crown.]

He owes a duty to the Crown through the Canadian Government and the manifestation of that duty is in Canada. The duty of a Canadian soldier is to his own government and the statute does not cover persons outside the jurisdiction.

[SOMERVELL L.J. We only want to hear you, Mr. O'Connor, on what would have been the position apart from the Visiting Forces (British Commonwealth) Act, 1933.]

P. McC. O'Connor for the defendant. When a Canadian soldier is properly sent to England in the course of his duty he is a direct servant of the Crown and quite apart from the Visiting Forces (British Commonwealth) Act he swears allegiance to the Crown. It is a personal oath of allegiance and it cannot differ according to the place where it is sworn. The statute is not limited to British citizens, and a French or American soldier, if carrying out a public duty in this country, would be protected by the Act. The matter is concluded by the Act of 1933.

SOMERVELL L.J. [having stated the facts and read section 21 of the Limitation Act, 1939, continued]:—The Lord Chief Justice said early in his judgment, after reciting the history [1]: "The points "which arise in the case and which have been argued before me "are first, whether a soldier on duty is entitled to the protection of "the section as being a public authority engaged in a public duty "and, secondly, whether the Act in any case affords protection "to a member of the Canadian Forces, even on the assumption "that it would to a member of the British Forces."

Mr. Vester, in arguing the appeal, considered first the first question, and I will do the same. Lord Goddard referred to two cases, one in 1945 and one in 1947, in which the Act had been applied in favour, in the first case, of a member of the Canadian armed forces, and, in the second case, in favour of a sergeant in the British Army. In neither of those cases was the point which was argued before the Lord Chief Justice raised. He then proceeded to refer to a Scottish case, *Wilson* v. *First Edinburgh City Royal Garrison Artillery Volunteers and Lieut.-Col. Mackay.*[2] I will summarize the headnote from that case. It was an action for damages against a regiment of volunteers and against the officer commanding the regiment, as representing the regiment, and as an individual, by the father of a child who was killed on the public street by an ammunition waggon, the horses of which had bolted. The pursuer averred that the accident had been caused by the fault of the commanding officer in not seeing that quiet horses were used, that competent drivers were employed, that the waggons were driven according to military regulations, and that a competent commissioned officer was present to superintend the parade. The action was not raised within six months after the date of the accident. It was held "that the action against the commanding officer, as an individual, "was excluded by the statute, on the ground that the fault "averred against him was neglect of duty in his public capacity "as commanding officer."

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[1] [1952] 2 T.L.R. 361, 362.

[2] 7 S.C. 168.

That case was referred to with approval in *The Danube II.*[3] It held that "the Public Authorities Protection Act, 1893, applies "to servants of the Crown acting within the scope of their public "duties, and the Act is not impliedly repealed." In that case there had been a collision in the Thames Estuary between a ship which was on a voyage to Middlesbrough in ballast and a battle practice target which was being towed from Portsmouth to Scapa Flow. The defendant, who was a Lieutenant R.N.R. in charge of the tug, pleaded "that he was acting in pursuance or execu- "tion, or intended execution, of a public duty or authority, and "that as the action had not been begun within six months after "the act, neglect, or default complained of" he was protected by the Act. It was held by this court that he was protected. Lord Sterndale M.R., after reading the relevant words from the section, said[4]: "It seems to me that a man who, under the "orders of the Crown—in this case the Admiralty, which is a "department of the Crown—is taking a battle target to Scapa "Flow for the purposes of the fleet, is undoubtedly engaged in "a public duty. Perhaps no member of the public could complain "if he did not take it; but certainly he was doing what was for "the benefit of the public, and under the authority of the Crown, "and it can, I think, hardly be denied that the Crown is a public "authority. I think, therefore, that the Act applies to this case, "and that none of the cases to which we have been referred in "any way militate against that view. The same view has been "held in cases not binding upon us, by Lawrence J. and Darling "J., and it also seems to me to be involved in the decision in "*Wilson* v. *1st Edinburgh City R.G.A. Volunteers.*[5] In my

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[3] [1921] P. 183; 37 T.L.R. 421.

[4] [1921] P. 183, 187.

[5] 7 S.C. 168.

"opinion, therefore, the first point fails." Scrutton L.J. put it in this way[6]: "I share the difficulty that the House of Lords "felt in *Bradford Corporation* v. *Myers*,[7] in knowing exactly "what the limit is in the Public Authorities Protection Act "between those acts which are protected by the measure of "limitation and those acts which are not. But on the best consideration I can give to the matter it appears to me that the "Admiralty were under a public duty to make provision for public "defence; that in carrying out the particular measure of sending "a battle target to Scapa Flow by tug, they were carrying out "that public duty; and that the neglect of the servant in charge "of the tug was a 'neglect in the execution of any such duty' "within the words of the Act. The particular action, therefore, "is prima facie within the Public Authorities Protection Act." Those are both cases in which the defendant was an individual and not, as in many of these cases, a body like some local authority.

I do not know whether it could have been suggested at any time that that principle might only apply to servants of the Crown, because it was impossible at that date to take proceedings against the Crown. Such a view is inconsistent with *Greenwell* v. *Howell*,[8] a decision of this court. That was a case where a landowner, the plaintiff, was denying that a road over his land was a public highway. He was "threatening proceedings against any "person using it. Two officials of the county council were "directed by the council, acting under the provisions of the Local "Government Act, 1894, s. 26, to use the road for the purpose "of formally testing the right, which they accordingly did. The "landowner thereupon brought an action of trespass against "them, but at the trial it was found that the road was a public "highway, and judgment was given for the defendants:—*Held*, "that, the acts in respect of which the action was brought "having been done by the defendants in pursuance or execution "or intended execution of the Local Government Act, 1894, "s. 26, the case came within the Public Authorities Protection "Act, 1893, s. 1, and therefore the defendants were entitled to "costs to be taxed as between solicitor and client under that "section." A. L. Smith L.J. said[8]: "I think that, having "regard to these provisions, the acts done by the defendants in "pursuance of the orders given by the county council were

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[6] [1921] P. 183, 188.

[7] [1916] 1 A.C. 242; 32 T.L.R. 113.

[8] [1900] 1 Q.B. 535, 539; 16 T.L.R. 235.

"clearly acts done in pursuance or execution or intended "execution of an Act of Parliament."

Mr. Vester submitted that in certain House of Lords cases doubt was found to be thrown on that case. I do not myself accept that submission. The first case to which he referred was *Bradford Corporation* v. *Myers*.[9] The problem there being considered seems to me to have been quite a different one. The defendants, who were a municipal corporation, were authorized by Act of Parliament to carry on the undertaking of a gas company, and they did so. "The defendants "contracted to sell and deliver a ton of coke to the plaintiff, and "by the negligence of their agent the coke was shot through the "plaintiff's shop window. More than six months afterwards the "plaintiff commenced an action of negligence against the defen- "dants." The defendants pleaded section 1 of the Public Authorities Protection Act, 1893:—"*Held*, that the act complained of "was not an act done in the direct execution of a statute, or in "the discharge of a public duty or the exercise of a public "authority, and that the Public Authorities Protection Act, "1893, afforded no defence to the action."

There have been other cases where that principle has been applied. The principle is summed up, I think, concisely, though the line may be difficult to draw, by Lord Maugham in *Griffiths* v. *Smith*,[10] where he says: "My Lords, since the decision of this "House in the *Bradford Corporation* case and the tacit or express "approval of the cases I have referred to, it has been impossible "to doubt (if it was doubtful before) that it is not essential that "a public authority seeking to rely on the Act of 1893 must show "that the particular act or default in question was done or com- "mitted in discharge or attempted discharge of a positive duty "imposed on the public authority. It is sufficient to establish "that the act was in substance done in the course of exercising "for the benefit of the public an authority or a power conferred "on the public authority not being a mere incidental power, "such as a power to carry on a trade." It is not enough to show that it is simply intra vires. Having considered that case and the other cases to which we were referred, I can find nothing in them intended to throw any doubt on the principle laid down in *Greenwell* v. *Howell*.[11] One can, of course, occasionally find sentences which indicate what no doubt was in the noble and learned Lord's mind, namely, that he was considering at the moment proceedings where the public authority itself was the defendant. I can find nothing which throws any doubt on the principle laid down in *Greenwell* v. *Howell* [11] that the servants of that public body, acting in the execution of duties which would be within the Act, are outside its protection. Indeed there are sentences which I think point the other way.

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[9] [1916] 1 A.C. 242.

[10] [1941] A.C. 170, 185; [1941] 1 All E.R. 66; 57 T.L.R. 185.

[11] [1900] 1 Q.B. 535.

The Lord Chief Justice clearly had the principle of the *Bradford* case [12] in mind. He says [13]: "It was for this reason that, "before deciding, I required, not only an admission that the "defendant was on duty, but also as to the nature of the duty, for "I can conceive that if, let us say, the commanding officer of a "battalion or depot had to attend some social function, such as "a regimental sports meeting or a special church service, for "which it might be quite proper for him to use an army car, it "may be that in such circumstances the driver would not be "engaged on public duty, and if an accident took place on the "journey, he might not be protected by the section. The only "evidence which could be given was that contained in the road "accident report, which it was agreed I should look at, and which "showed that on the day in question the defendant was on a "journey from the army garage to Waterloo Station for duty in "connexion with the railway transport officer, and that his journey "had been authorized by the officer commanding the transport "company. It seems to me clear, therefore, that this was a "journey which the defendant was required by his military duty "to undertake and that the duty was in connexion with army "service."

Mr. Vester submitted that we should not regard that evidence, as agreed to be admitted, as enough, and that we should reverse the judgment on that point. I do not take that view. The accident happened a very long time ago, and, at any rate, the defendant is not to blame for the fact that there has been such a long delay. I would have said myself, agreeing fully with the Lord Chief Justice, that the proper inference from that report was that at the time of this accident the defendant was carrying out his military duties.

The next point taken by Mr. Vester was that a private soldier driving a lorry could not be a public authority. That, of course, would involve what seems to me to be an impossible distinction. No doubt in *Greenwell's* case [14] the two defendants were doing a positive act of walking along a highway. But, on the other hand, in the case of *The Danube II* [15] the claim was based on alleged negligence in navigation. In that case, as I have said, the master of the tug was a lieutenant, but one can imagine some boat being sent, whether pulling a target or not, on what would equally be a naval duty where the person in charge might be a warrant officer, or, indeed, a rating. I cannot see how one could apply the principle as laid down by Scrutton L.J. to one case and not to the other. There clearly is direct authority that neglect in discharge of a duty does not disentitle the defendant from claiming the protection of the Act.

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[11] [1900] 1 Q.B. 535.

[12] [1916] 1 A.C. 242.

[13] [1952] 2 T.L.R. 361, 364.

[14] [1900] 1 Q.B. 535.

Mr. Vester's next point was that a soldier, as here, driving a lorry on a highway, should be regarded as not in the execution of his duties, but the accident should be regarded as caused by a breach of a private right. I find great difficulty about that. In all the ordinary cases, of course, the plaintiff is complaining of a breach of his private rights. Once one comes to the conclusion to which I have come that the neglect was in the carrying out of duty, as is indeed the commonest case which occurs where the protection of the Act is invoked, I do not think that that submission avails the plaintiff. Once you find that the claim is based on some act or neglect in carrying out duties, it seems to me that, having regard to the cases which I have cited, the Act applies. On that point, therefore, I agree with the Lord Chief Justice, for the same reasons as he gave.

With regard to the second point, the question whether the Act does not apply because the defendant here was a Canadian soldier, the Lord Chief Justice regarded that as having to be decided in the defendant's favour by reason of section 2 (3) of the Visiting Forces (British Commonwealth) Act, 1933. Mr. Vester, in his approach to the construction of that section, submitted that apart from that Act, and having regard to the position of the Canadian forces, the duty could not be one within the Public Authorities Protection Act. We have not to decide that point, but Mr. O'Connor submitted that if visiting forces are here, whether dominion or, as in war, foreign forces, prima facie at any rate it would be proper to regard them, when carrying out military duties, as fulfilling a duty within the Act. As I have said, we have not to decide the point, and it may be that if it were argued out difficult questions might well arise. The only relevance, I think, is this: If there is any ambiguity in the Act which we have to construe, is it the type of protection which one might well expect to be applied by Parliament to visiting forces? I think it is, but, speaking for myself, I think that the words of the Act are plain and, therefore, the question as to the position apart from the Act does not arise. The relevant words are to be found in section 2 (3). [His Lordship read paragraphs (*a*) and (*b*) of subsection (3) and continued:] Having regard to the general intention of that subsection, to be gathered from its terms and the generality of the words used, I think that the Lord Chief Justice was right in saying that the Public Authorities Protection Act was an enactment which fell to be applied to a visiting force as it would apply to a home force of a like nature to the visiting force.

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[15] [1921] P. 183.

In those circumstances, I think that point also fails, and I would dismiss the appeal.

Birkett L.J. I am of the same opinion, and quite manifestly it is difficult to add anything to the judgment which has already been delivered. Not only do I agree with the judgment which has just been delivered, but I also agree with the judgment of the Lord Chief Justice. He seemed to me to take particular and especial care to see that the precise point which was in issue should be before him, in order that he might come to a fair and just determination. Here, today, in the judgment to which we have just listened, all the relevant facts have been fairly stated, and it would be a waste of time to state them all over again. Furthermore, with regard to the relevant law the cases which have been cited by Mr. Vester have been dealt with in their material passages. It is quite clear that the only issues before the Lord Chief Justice, and, indeed, the only issue in this appeal, arose out of paragraph 4 of the defence, in which it was said that this defendant, a Canadian soldier, when this accident occurred for which the plaintiff seeks damages, was driving the lorry which occasioned the accident in the course of his duties as a member of His Majesty's Canadian Armed Forces, and therefore was protected by section 21 of the Limitation Act of 1939. The words of section 21 (1) are really very wide, as indeed were the terms under the Public Authorities Protection Act, 1893. I observe that Scrutton L.J., who in *The Danube II*[16] had delivered a judgment on the construction of the Public Authorities Protection Act, also delivered one in *Edwards* v. *Metropolitan Water Board*,[17] to which just a casual reference was made in the course of the argument. Having cited the words of the Act, which are substantially those of section 21 of the Limitation Act, he said this: "As the legislature was codifying and replacing a "large number of clauses in slightly different language, no doubt "it used very wide words. Five years after the Act was passed "Lindley M.R. foresaw the difficulties that would arise. 'It "'is not necessary,' he said in *Fielding* v. *Morley Corporation*,[18] "'to consider what cases, if any, do not fall within the Act, "'although apparently within the words. I add that by way "'of precaution, because some day there will probably be a "'great discussion as to what acts or defaults do or do not come "'within it.'"

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[16] [1921] P. 183.

[17] [1922] 1 K.B. 291, 303.

Certainly that forecast has been very amply fulfilled. Scrutton L.J. in the same judgment pointed out that in *Bradford Corporation* v. *Myers*,[19] which has been so much discussed in this court, there was the true fulfilment of the words of the Master of the Rolls. He quoted these words, which I want to apply to this case, of Lord Haldane: "'It is often obvious from the words he "'has employed that the draftsman has had instructions which "'have been too vague and insufficient to admit of the expression "'of a comprehensive principle with exactness, or at all. In "'such a case the court can only take the particular facts in the "'case before it, and decide as best it can whether they come "'within the words, or whether they fall altogether outside "'them.'"

Scrutton L.J. added: "There are two statements in that "case"—that is the case of *Bradford Corporation* v. *Myers* [19]— "which seem to lay down a principle. Lord Buckmaster said: "'It is because the act is one which is either an act in the direct "'execution of a statute, or in the discharge of a public duty, or "'the exercise of a public authority.'" The Lord Justice also cited a point of principle from Lord Haldane: "'I do not think "'that they'—i.e., the words of the Act—'can be properly "'extended so as to embrace an act which is not done in direct "'pursuance of the provisions of the statute or in the direct "'execution of the duty or authority.'" He then went on to say: "The word 'direct' is not in the statute." I have quoted that for this reason, that I think that the Lord Chief Justice was here concerned to see that the precise facts that he had to decide, where the words of the section were so wide, were clearly before him without ambiguity. My Lord has already read at length the passage in which the Lord Chief Justice considered the matter, but I quote the words where he said [20] that the report showed "that on the day in question the defendant was on a journey from "the army garage to Waterloo Station for duty in connexion with "the railway transport officer, and that his journey had been "authorized by the officer commanding the transport company," and the other words: "It seems to me quite clear, therefore, "that this was a journey which the defendant was required by his "military duty to undertake and that the duty was in connexion "with Army service."

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[18] [1899] 1 Ch. 1, 4; [1900] A.C. 133.

[19] [1916] 1 A.C. 242, 304.

The Lord Chief Justice, therefore, was dealing with it as a case in which the defendant was clearly carrying out his military duty, and he was careful to exclude, by an ascertainment of the real facts, anything which might suggest that this was a duty outside his recognized military duties. I think that it is upon that footing that this court has to deal with this matter. When it is said by Mr. Vester that somehow this case must be looked at not as that of a Canadian doing his military duty, but as a simple case in which he was doing a private wrong to some private person, I think that he is really clearly excluded by the words of the section which I have read. I am of the opinion that the first and second points which were raised by Mr. Vester ought to fail.

With regard to his point that the defendant, being a Canadian soldier, is not protected, I think the Visiting Forces (British Commonwealth) Act, 1933, particularly in section 2 (3), completely covers that point. I think the words "Subject as hereinafter "provided, any enactment"—specifying some—"or any other "statute which . . . (*b*) in virtue of a connexion with the home "forces or any of them, confers a privilege or immunity on any "person . . . shall . . . apply in relation to a visiting force as it "would apply in relation to a home force of a like nature to the "visiting force" must mean what the Lord Chief Justice said they meant. In ordinary common English the section was really seeking to say this: if you find in any particular statute something which to a United Kingdom soldier gives a privilege or an immunity, then that shall apply with equal force to a Canadian soldier who is a member of the Canadian Army visiting the United Kingdom. I cannot think that it can mean anything else. I think that the point taken upon that matter by Mr. Vester also fails.

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[20] [1952] 2 All E.R. 506, 508.

For these reasons I agree with the judgment which has just been delivered by my Lord.

ROMER L.J. I also agree, and there is very little that I wish to add. It is plain that a public authority can only act through its servants or its agents, whether it be in navigating a ship or driving a lorry or challenging a right of way. Therefore Mr. Vester's admission that certain officials of a public authority could properly be regarded as entitled to the benefit of the Public Authorities Protection Act was obviously well-founded. But, as I understood it, he sought to draw a distinction between responsible or senior officials, on the one hand, and employees or representatives of a more subordinate character on the other. I cannot see that there is any warrant for that distinction. It certainly was not drawn in *Greenwell* v. *Howell*[21]; nor is it to be found in the observations of the Court of Appeal in *The Danube II.*[22] In *Griffiths* v. *Smith*,[23] to which my Lord has referred, Lord Maugham said: "That persons in a somewhat similar position "to that of the managers in the present case have been "treated as a public authority has been decided in numerous "cases. The following are examples: River Commissioners and "harbour boards acting without profit (*The Johannesburg*[24] and "*Williams* v. *Mersey Docks and Harbour Board*[25]); all kinds of "sanitary, water and tramway authorities, and the officers and "servants of such authorities, e.g., medical officers of health, or "persons in a like position." It seems to me that as Lord Maugham's language, which I have read, was in perfectly general terms, it may be regarded as an authoritative recognition by him of what I should have thought myself was clear, namely, that provided that a representative of a public authority is told to perform an act of public duty, then, if the other elements are present which are requisite to attract the operation of the Act, it will be attracted whatever be the position of employment of the representative in question. Indeed, if one is to draw the kind of distinction which Mr. Vester invited us to draw, it seems to me that it would be a task of an impossible kind to classify officials who do qualify for protection as distinct from those who do not.

That is all I would like to add, except for one word on the Canadian Army question, that is to say, whether the defendant here is disqualified because he is in the Canadian Army and not in the British Army. I should like to say, with my Lord, that that point must be regarded as left open by our decision. It is not necessary to decide it because I quite agree with what has been said as to the interpretation of section 2 (3) of the Visiting Forces (British Commonwealth) Act, 1933; and indeed the point might well give rise to questions of fact whether a member of one of the Dominion Forces did qualify for protection or not, depending in some cases upon the circumstances and the reasons why his unit was stationed in this country. Matters of that kind might have to be inquired into, and for my part I agree that that question, which was not debated elaborately before us, should be left at large.

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[21] [1900] 1 Q.B. 535.

[22] [1921] P. 183.

[23] [1941] A.C. 170, 186.

[24] [1907] P. 65.

[25] [1905] 1 K.B. 804; 21 T.L.R. 397.

I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Preston, Lane-Claypon & O'Kelly; L. Bingham & Co.*

A. W. G.

BELL *v.* TRAVCO HOTELS LD.

[1951 B. No. 5585.]

C. A.
1953
Feb. 11.
Lord Goddard C.J., Singleton and Hodson L.JJ.

Innkeeper—Paying guest injured by fall on drive—Standard of care—Implied warranty to take reasonable care that premises are reasonably safe.

The plaintiff, a paying guest at the defendants' hotel, fell and suffered injuries while walking down the quarter-mile drive, which was the only road for foot passengers to and from the hotel. She claimed damages for breach of an implied warranty by the defendants to make the premises as safe as reasonable care and skill could make them; and, alternatively, that they failed to warn her, an invitee, of an unusual danger on their premises. The trial judge found that the plaintiff had slipped because some of the surface stones had worn slippery. Applying as the standard of care imposed on the defendants by their contract with the plaintiff the duty to make the premises as safe for the contemplated purpose of walking on the drive as reasonable care and skill on the part of anyone could make them, he held them liable for breach of implied warranty in respect of that part of the drive which he held was a danger.

On appeal by the defendants:—

Held, allowing the appeal, that the standard of care required of a hotel-keeper under his contract with a paying guest in respect of a well-made drive a quarter of a mile in length which formed part of his premises was only to take reasonable care to see that the drive was reasonably safe for foot passengers to walk on; that the defendants had taken such reasonable care; and that there was here no unusual danger.

Test of du Parcq L.J. in *Gillmore* v. *London County Council* (1938) 55 T.L.R. 95; [1938] 4 All E.R. 331, and not that of McCardie J. in *Maclenan* v. *Segar* [1917] 2 K.B. 325, 332, 333; 33 T.L.R. 351, applied.

Decision of Havers J. reversed.

APPEAL from Havers J.

On June 1, 1950, the plaintiff, Miss Dorothy Louisa Bell, aged 57, was received by the defendants, Travco Hotels Ld., hotel-keepers, as a paying guest for the night at their hotel, the Grand Hotel, Grange-over-Sands, Lancashire, during a motor-coach tour. At about 7.30 p.m., after dining, she and her fellow-travellers walked down the drive which formed part of the hotel premises and was the only road for foot passengers to and from the hotel, when she fell and sustained injuries to her ankle. The drive was a quarter of a mile in length, 18 feet wide, and covered with coarse tarmacadam; near the point of the fall it sloped down rather steeply to join the main road.

The plaintiff claimed damages for breach of an alleged implied warranty in her contract with the hotel in that they had failed to make their premises as safe as reasonable care and skill could make them, by causing or permitting the surface of the drive to be slippery and dangerous. Alternatively, she claimed that they had been negligent in failing to warn her, an invitee, of an unusual danger on their premises. The defendants denied breach of the alleged warranty, claiming that if the plaintiff had slipped, she was negligent or guilty of contributory negligence.

An auctioneer and surveyor, called as an expert witness by the plaintiff, said at the trial that the road was well made, but that some of the larger surface stones had become shiny and polished through wear.

Havers J. found that the plaintiff slipped, and slipped because that part of the drive on which she was walking was slippery. He then reviewed the authorities on breach of an implied warranty and held, on the application of the rule as laid down by McCardie J. in *Maclenan* v. *Segar*,[1] that, under the terms of the contract between the plaintiff and the defendants, there was an implied warranty by the defendants that the premises, including the drive, which was the only way by which a guest could arrive at or leave the hotel, were as safe for the contemplated purpose, namely, for foot passengers to walk on, as reasonable care and skill on the part of anyone could make them; and that there had been a breach of such implied warranty in that there were a number of slippery patches which were a danger to a foot passenger using that part of the drive. He gave judgment for the plaintiff and awarded her damages of £710 3s. for breach of the implied warranty.

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[1] [1917] 2 K.B. 325, 332–3; 33 T.L.R. 351.

The defendants appealed.

John Thompson for the defendants. Havers J. held that the duty owed by the defendants to the plaintiff, a paying guest for one night, was to see that the drive throughout its length was as safe as reasonable care and skill on the part of anyone could have made it; that is, he applied the standard of duty for an occupier of premises who has agreed for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, as it was stated by McCardie J. in *Maclenan* v. *Segar*,[1] following *Francis* v. *Cockrell*.[2] If *Maclenan* v. *Segar*[3] is still authority (though not binding on this court), it is submitted that it should be followed only in regard to a much narrower subject matter than this drive. In that case the plaintiff did not have to establish negligence on the part of the hotel-keeper when a fire broke out in the hotel in which she was a paying guest owing to a defective scheme for conveying the smoke and burning soot from the kitchen. Here, however, the court has to consider the measure of obligation with regard to the use of ways ancillary to the main contract. It is submitted that the highest duty on the defendants as occupiers was to take reasonable care to make the premises reasonably safe. That standard, which differs little from that laid down in *Indermaur* v. *Dames*,[4] was applied by Parker J. in *Protheroe* v. *The Railway Executive*[5] in regard to something as intimately connected with the railway carriage as the edge of the platform on to which the passenger had to descend.

[LORD GODDARD C.J. The distinction between the tests seems to me to be metaphysical. So long as one retains the qualification of "reasonable" it is all right; otherwise one puts an absolute duty on the occupier.]

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[1] [1917] 2 K.B. 325, 332–3; 33 T.L.R. 351.

[2] (1870) L.R. 5 Q.B. 501.

[3] [1917] 2 K.B. 325.

[4] (1866) L.R. 1 C.P. 274; affirmed in Exch. Ch. (1867) 2 C.P. 311.

[5] [1951] 1 K.B. 376; 66 T.L.R. (Pt. 2) 980; [1950] 2 All E.R. 1093.

If a hotel occupier invites a guest to his hotel and the bed in which he sleeps falls to bits under him, the hotel-keeper might escape liability by showing that he got it from the best suppliers; but in *Francis* v. *Cockrell*[6] the duty of the grandstand occupier as stated was that he warranted it was reasonably fit, and he was therefore liable.

[LORD GODDARD C.J. But he employed someone else to build the grandstand for him and the builder's negligence was his own.]

Compare *Gillmore* v. *London County Council*,[7] where du Parcq L.J. said only that the person who held a physical training class on a floor which was not safe for the purpose had not taken "reasonable care," and that he was not sure that one could apply to that case the rule associated with *Maclenan* v. *Segar*.[8] The duty there stated was that those who invited a man for reward to take part in physical training impliedly warranted that they had taken reasonable care to see that the premises were in all respects reasonably safe for the purpose.

B. S. Wingate-Saul for the plaintiff. It is for the judge who tried the case to decide whether or not the degree of slipperiness he found on the drive was such as to be a danger: see *Davies* v. *De Havilland Aircraft Co. Ld.*[9] The defendants here called no evidence to suggest that they took any steps amounting to reasonable care to see that the premises were safe for the purpose of being walked on. If McCardie J.'s test is still good law, it covers the facts here as to the warranty to be implied in the contract between the hotel-keeper and his paying guest. The proper test is: What is the main purpose of the contract and what is ancillary? See Salmond on Torts, 10th ed., p. 473: "Where the use of the premises is only ancillary to the main "purpose of the contract, the liability of the occupier is assimi-"lated to that of his liability to an invitee." It is submitted that here the essence of the contract is "Come on to my hotel "premises as a guest." By contrast, in *Gillmore's* case[10] the essence of the contract was "We will teach you physical "training" and not that the training should take place on a particular floor. *Maclenan* v. *Segar*[11] was cited in the argument in that case, and du Parcq L.J. did not say that it was bad law but only that it did not apply to the particular facts.

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[6] L.R. 5 Q.B. 501.

[7] [1938] 4 All E.R. 331, 333; 55 T.L.R. 95.

[8] [1917] 2 K.B. 325.

[9] [1951] 1 K.B. 50; [1950] 2 All E.R. 582.

[10] [1938] 4 All E.R. 331.

[11] [1917] 2 K.B. 325.

[LORD GODDARD C.J. Surely the use of this drive was just as "ancillary" to the main purpose of the contract as the use of the floor in *Gillmore's* case.[12]]

[SINGLETON L.J. The contract here was to stay in the hotel for one night, and if the plaintiff walked down the drive in the evening it might be said to be ancillary to the main purpose.]

Though *Maclenan* v. *Segar*[13] has not at any time been followed by this court, it has been considered, and in *Hall* v. *Brooklands Auto Racing Club*[14] Greer L.J. supported it[15]; and Cassels J. approved it in *Campbell* v. *Shelbourne Hotel Ld.*,[16] while Sellers J. did not disapprove of it in *Ellen Pope* v. *St. Helen's Theatre Ld.*,[17] where the defendants conceded the warranty.

[LORD GODDARD C.J. Do not the cases, when examined, really come to this, that when one person invites another on to his premises for reward he is responsible not only for lack of care on his own part but also for any contractor whom he has employed; but an invitor escapes liability to a bare invitee if he shows that he has employed reputable contractors? This very strained rule with regard to the duty of hotel-keepers emerges from McCardie J.'s view rather than from the decisions which he cited in his judgment. His proposition would make the occupier of premises an insurer.]

If *Maclenan* v. *Segar*[18] went too far, it is remarkable that 30 years later in questions on a point of law of almost daily occurrence in the courts, the case has so far stood the test of time.

[LORD GODDARD C.J. The Law Reform Committee is considering the question of licensees and invitees at present, and may amend the position by legislation.]

It is submitted that *Maclenan* v. *Segar*[18] is still good law and that the present case comes within that decision. If that case is not good law, then on the facts as found by Havers J. the plaintiff is entitled to succeed by reason of the breach of duty of invitor to invitee in failing to warn the plaintiff of an unusual danger.

LORD GODDARD C.J. This is an appeal from a judgment of Havers J., who found for the plaintiff in an action brought to

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[12] [1938] 4 All E.R. 331.

[13] [1917] 2 K.B. 325.

[14] [1933] 1 K.B. 205; 48 T.L.R. 546.

[15] [1933] 1 K.B. 205, 223.

[16] [1939] 2 K.B. 534, 540; 55 T.L.R. 938; [1939] 2 All E.R. 351.

[17] [1947] K.B. 30; 62 T.L.R. 588; [1946] 2 All E.R. 440.

[18] [1917] 2 K.B. 325.

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recover damages for personal injuries in most unusual circumstances; in fact, for many years I do not remember a case like this. This is one of those cases in which the injury caused was due to a slip, and, as everybody knows, slipping is one of the most usual incidents in the changes and chances of this mortal life. As Somervell L.J. put it in *Davies* v. *De Havilland Aircraft Co. Ld.*[1]: "It would be impracticable so to maintain passages, "roads and pathways that there was never a slippery place "where, especially after rain, a workman might slip. Slipping is "quite a common incident of life, and mostly no harm is done "by it, although unfortunately this plaintiff did suffer serious "injury."

Nowadays, if somebody is unfortunate enough to meet with an accident from which some injury results, it is always thought that there ought to be somebody to pay. I think that that idea is getting far too common. It is not for every injury that a person may sustain in the course of everyday life that he or she can recover compensation; it can only be recovered if that injury is due to the fault of somebody who owes a duty to that person.

[His Lordship stated the facts, and continued:] I should certainly think, in the case of an ordinary drive which has been metalled, that there must be places which are slippery from time to time, and places at which it is possible to slip, but I cannot see myself that there was any evidence here that would justify the drive being called dangerous, and there certainly was nothing unusual about it. The only evidence given about it was that of the person who gave so-called expert evidence, and who said that he thought that it ought to have had some limestone chips put on it when it was laid. What the effect of doing that would have been after three years' wear I do not know, but I should hardly think that it would be considered the duty of anyone to repair a well made-up drive more often than every three years, and apparently this drive is in the same condition now as it was in in 1946.

The judge, I think, took the view that because this lady could and did slip, since undoubtedly one could slip at that place, he ought to hold that this was a dangerous place, and he applied the standard of care laid down by McCardie J. in *Maclenan* v. *Segar*,[2] that where one person receives another on to his premises for reward, there is an implied warranty that the premises are as safe as reasonable skill and care can make them.

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[1] [1951] 1 K.B. 50, 52.

[2] [1917] 2 K.B. 325, 332.

McCardie J. may have been right in applying that standard of care to the interior of an hotel, but if one is to apply that standard to a drive a quarter of a mile long, and say that every portion of that drive must be made as safe as reasonable skill and care can make it, it seems to me that it would have to be applied similarly to every path or place in the grounds of an hotel. The more satisfactory test to apply in a case like this is the standard which du Parcq L.J. laid down in *Gillmore* v. *London County Council*[3]: "If any person or body of persons invite a man for "reward to take part in physical training, and invite him to come "for that purpose to premises which they have hired, or of which "for the time being they are in possession, then, in those circum"stances, that person or body of persons impliedly warrant that "they have taken reasonable care to see that the premises are "in all respects reasonably safe for the purpose."

For myself, I cannot say that because it might be possible to find that one part of a drive, a quarter of a mile long, was slippery—and I am prepared to accept that it was slippery—one ought to hold that this drive was dangerous, or that that in itself was any evidence that the premises were not reasonably safe for the use of the guests at the hotel. I think that this is just one of those cases where a person on an evening walk meets with a misfortune. The mere fact that the plaintiff slipped because, it was found, there were some polished stones caused by ordinary wear in this drive, is no justification for holding that this was a dangerous place, or that reasonable care had not been used to see that the premises were reasonably safe. The duty of the defendants was to use reasonable care to see that the premises were reasonably safe. I do not think that there was any evidence of lack of reasonable care; I do not think that it was right to hold on these facts that the premises were not reasonably safe; and for these reasons I think that the judge came to a wrong conclusion, and that his judgment ought to be reversed.

SINGLETON L.J. I am of the same opinion. The case for the plaintiff was put in two ways. It was said, in the first place, that the contract between the plaintiff and the defendants contained an implied warranty that the premises were as safe for the purpose for which they were being used as reasonable care and skill on the part of anyone could make them. Secondly, it was said that the plaintiff was at least an invitee of the defendants,

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[3] [1938] 4 All E.R. 331, 333.

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and that they had failed to exercise the care, or to carry out the duty, which they owed to her.

The judge determined the case on the first submission, and he gave judgment in these terms: "I hold, therefore, that, under "the terms of the contract between the plaintiff and the defendants in the circumstances of this case, there was an implied "warranty by the defendants that the premises were as safe for "the contemplated purpose as reasonable care and skill on the "part of anyone could make them."

This plaintiff was the guest of the defendants at their hotel. At the time when she met with an accident, she was a quarter of a mile away from the hotel at the far end of the drive close to the main road. Havers J., following that which McCardie J. said in *Maclenan* v. *Segar*,[4] held that there was an implied warranty on the part of the defendants that that particular portion of the drive on which she slipped was as safe for the contemplated purpose as reasonable care and skill on the part of anyone could make it. McCardie J., in *Maclenan* v. *Segar*,[4] was considering an accident inside an hotel. The circumstances here are different, and it is unnecessary to express any opinion on the judgment of McCardie J., for it cannot be held to cover and to extend to the particular facts of this case. In circumstances such as these, I think that the duty stated by du Parcq L.J.[5] is sufficient for this purpose; namely, that the defendants impliedly warranted that they had taken reasonable care to see that the premises were in all respects reasonably safe for the purpose for which they were to be used. There is, I think, no evidence to the contrary. I am satisfied for myself that they had taken reasonable care to see that that drive was reasonably safe for use as a drive whether for people to drive or walk on.

On the second head of the case, it was claimed that the defendants were negligent. The duty owed to an invitee is that she, using reasonable care on her part for her own safety, is entitled to expect that the invitor shall for his part use reasonable care to prevent damage from unusual danger of which he knows, or ought to know. It is sufficient to say that there was no unusual danger here. If the danger of slipping could be described by anyone as unusual, it seems to me, again, on the facts of this case, that the hotel proprietors had taken reasonable care; indeed, the judge did not find that they had not. I agree that the appeal ought to be allowed, and that judgment should be entered for the defendants.

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[4] [1917] 2 K.B. 325, 332–3.

[5] [1938] 4 All E.R. 331, 333.

HODSON L.J. I also agree. I wish only to add, on the contractual aspect of this case, that in the circumstances I would apply the test laid down by du Parcq L.J. in *Gillmore* v. *London County Council*,[5] which was also recently applied by Parker J. in *Protheroe* v. *The Railway Executive*,[6] rather than the test which the judge felt himself obliged to apply, and which was laid down by McCardie J. in *Maclenan* v. *Segar*.[7]

I therefore agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Fred Hollis; Claremont, Haynes & Co.*

M. M. H.

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[5] [1938] 4 All E.R. 331, 333.

[6] [1951] 1 K.B. 376.

[7] [1917] 2 K.B. 325, 332–3.

REGINA *v.* MELVIN; REGINA *v.* EDEN.

C. C. A.
1953
Jan. 19.

Lord Goddard C.J., Croom-Johnson and Pearson JJ.

Criminal Law—Appeal—Alternative counts—Acquittal on larceny count—Conviction for receiving—Court's power to substitute correct verdict—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 5 (2).

Where an indictment contained two counts, one for larceny and the other for receiving, and the jury acquitted on the larceny count and convicted on the receiving count, although on the evidence the accused were clearly guilty of larceny, the Court of Criminal Appeal had no power under section 5 (2) of the Criminal Appeal Act, 1907, to substitute a verdict of guilty of larceny for the incorrect verdict of receiving, and the conviction was quashed.

R. v. *Evans* (1916) 12 Cr.App.R. 8 followed.

R. v. *Smith* (1923) 17 Cr.App.R. 133 distinguished.

APPEAL against conviction.

On the night of August 22, 1952, the police having received information that a serious office breaking was being or had been carried out at the offices of the British European Airways at Keyline House, Ruislip, were waiting at a yard close to King's Cross. A lorry drove up in which there were three men, the two appellants, and a third man who afterwards absconded from his bail. When the men got out of the lorry they suddenly became aware of the police, and one of them shouted "It is

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

"the law." Three safes from the offices of the B.E.A. were found in the lorry together with housebreaking tools.

The indictment against the appellants contained two counts, one for breaking and entering and larceny and the other for receiving. The trial, which took place at the Central Criminal Court before Mr. Commissioner Goodman Roberts Q.C., was conducted by the prosecution as one on the count for breaking and entering, and the commissioner summed up on that basis, giving the jury no direction on receiving. The jury returned a verdict of not guilty of breaking and entering but guilty of receiving.

James Burge for the appellants. Where a trial has been conducted on the basis that, if any offence is proved, that offence is breaking and entering or larceny, and an alternative count for receiving stolen property has been left to the jury without any proper direction in law on that count, a conviction of receiving must be quashed: *R.* v. *Lincoln* [1]; *R.* v. *Christ.*[2] In the present case the commissioner gave the jury a direction in law on the count for office-breaking based on recent possession of stolen property which might almost have been a direction on the offence of receiving and the jury rejected it.

[LORD GODDARD C.J. The court would like you to deal with the powers of the court under section 5 (2) of the Criminal Appeal Act, 1907.[3]]

The wording of that subsection clearly shows that the court has no power to substitute a conviction of an offence where there has been an acquittal of that offence by a jury. The doubts expressed by the court in *R.* v. *Hayward* [4] were probably due to the ambiguous nature of the report of *R.* v. *Smith*,[5] which was the only authority cited to the court. That court was not referred to the earlier cases of *R.* v. *Evans* [6] and *R.* v. *Fisher*,[7] which correctly state the law.

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[1] (1944) 60 T.L.R. 250; [1944] 1 All E.R. 604; 29 Cr.App.R. 191.

[2] [1951] 2 T.L.R. 85; [1951] 2 All E.R. 254n.; 35 Cr.App.R. 76.

[3] Criminal Appeal Act, 1907, s. 5 (2): "Where an appellant has "been convicted of an offence and "the jury could on the indictment "have found him guilty of some other "offence, and on the finding of the "jury it appears to the Court of "Criminal Appeal that the jury must "have been satisfied of facts which "proved him guilty of that other "offence, the court may, instead of "allowing or dismissing the appeal, "substitute for the verdict found by "the jury a verdict of guilty of that "other offence, and pass such sen- "tence in substitution for the sen- "tence passed at the trial as may be "warranted in law for that other "offence, not being a sentence of "greater severity."

[4] (1948) 33 Cr.App.R. 1.

[5] (1923) 17 Cr.App.R. 133.

[6] (1916) 12 Cr.App.R. 8.

[7] (1921) 16 Cr.App. R. 53.

[The following cases were also cited: *R.* v. *Cooper, Shea and Stocks* [8]; *R.* v. *Cooper and Compton* [9]; *R.* v. *Watson.*[10]]

Edward Clarke for the Crown. There was evidence on which the jury could convict of receiving on a proper direction. If the jury had completely believed the appellants their correct verdict would have been not guilty on both counts.

Regarding the powers of the court to substitute a verdict of guilty of office-breaking, the submissions of counsel for the appellants are accepted.

LORD GODDARD C.J. delivered the judgment of the court:—This appeal must succeed. In giving that decision the court does so with the same reluctance that the court expressed in *R.* v. *Evans*,[1] which we cannot in fact distinguish from this case and which we think was rightly decided.

[His Lordship stated the facts of the present case and continued:] We have to be careful in this case because it is one in which no one who reads the evidence and summing-up, and realizes that the jury by their verdict have at any rate found that these two men were on a felonious enterprise that night, because they purported to find them guilty of a felony, could have any real doubt as to the guilt of these men. The difficulty arises because the case was put to the jury simply as one alleging that these men were the people who broke into the place and drove away with the property, and were found with the property. Their defence was an alibi, certainly not one of a very satisfactory character, and if the jury had believed it, it is difficult to understand how they could even have found these men guilty of receiving. But, the case having been presented from first to last as one in which these men were alleged to be the actual thieves, and the commissioner having summed up the case exceedingly well and carefully on that footing, for some reason or another the jury, after a long retirement, returned a verdict of not guilty of breaking and entering but guilty of receiving. No one had said anything about receiving from beginning to end. The commissioner had mentioned the charge of receiving in the course of his summing-up, but only for the purpose of directing the jury to disregard it.

This is one of those cases, of which the court has had a great deal of experience in the last two or three years, in which, on apparently the clearest evidence that the prisoners are the thieves, the jury say that they received the goods. Of course, one cannot receive from oneself; but there is no question here that, the case having been presented by the prosecution quite rightly as one of breaking and entering and larceny, and the commissioner having summed up on that basis, there was no direction given to the jury on receiving. If there had been a case of receiving put forward at all, it is difficult to see what the evidence of receiving was; and at any rate a very careful direction would have had to be given to the jury with regard to the law relating to possession. It would have had to be pointed out to them that if the story of the prisoners was in any way true, although the jury might have thought that these men were going to help to dispose of the property, the man who absconded from his bail was still there, and they could not on this indictment have found them guilty of receiving.

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[8] (1908) 24 T.L.R. 867; 1 Cr.App.R. 88.

[9] (1947) 63 T.L.R. 561; [1947] 2 All E.R. 701; 32 Cr.App.R. 102.

[10] [1916] 2 K.B. 385; 32 T.L.R. 580; 12 Cr.App.R. 62.

[1] (1916) 12 Cr.App.R. 8.

The only question which really arises in this case is whether the court has power to substitute a verdict of guilty of breaking and entering and larceny which, if the jury had thought that the accused were the criminals that night, they ought to have found, for the verdict of receiving which they did find. In our opinion, the court has no such power. [His Lordship read section 5 (2) of the Criminal Appeal Act, 1907, and continued:]

In our opinion that section would enable the court, for instance, in a case where a jury have returned a verdict of guilty of obtaining by false pretences, where the evidence showed that the accused person was really guilty of larceny, to substitute a verdict of larceny for a verdict of false pretences; or if a person had been found guilty of larceny as a bailee, it might be found that he ought to have been convicted of the offence of fraudulent conversion. Those are only illustrations of the class of case to which I think the section is designed to apply, but *R.* v. *Evans*,[2] to which I have referred, is an exact parallel to the present case. In that case there was a count for larceny and one for receiving, and the jury acquitted of larceny and convicted of receiving. The Court of Criminal Appeal said that they could not substitute the alternative verdict because that would be to substitute a verdict which the jury not only refused to find but on which they acquitted. I think that that must be the explanation of *R.* v. *Smith*,[3] where the jury did return a verdict of receiving in a case in which the only possible verdict was one of stealing. It only shows again what curious things juries do with regard to receiving, because in *Smith's* case[3] the evidence was that the prisoner had been seen to steal the goods, and yet the jury found him guilty of receiving. But we think that in that case, although Lord Hewart C.J. during the course of the case referred to it as a verdict which the jury refused to find, there is no indication that the jury found a verdict of not guilty on the first count in the indictment; they seem not to have found a verdict at all on that. I suppose they simply told the recorder that they found the man guilty of receiving, and the Court of Criminal Appeal there did substitute a verdict of larceny for one of receiving.

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[2] 12 Cr.App.R. 8.

[3] (1923) 17 Cr.App.R. 133.

If we could substitute a verdict in this case we should undoubtedly do so, because the court cannot really feel any doubt as to the guilt of these men. But as the jury have found this verdict of not guilty of larceny and guilty of receiving, we are of opinion that the verdict of receiving cannot stand, and the court has no option but, with great reluctance, to quash the conviction. There is a committee sitting under the chairmanship of Lord Tucker to consider the question of giving this court power to order a new trial, a power which this court has for many years, in fact ever since the Act came into operation nearly 50 years ago, regretted that it had not got, and this might be a useful case to bring to the attention of the committee. If we had the power to order a new trial, I think that this is a case in which we should do so. As it is, the conviction must be quashed and the prisoners are discharged.

Appeal allowed.

Solicitors: *Kingsley Napley & Co.; Solicitor for the Metropolitan Police.*

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[3] (1923) 17 Cr.App.R. 133.

RIVLIN *v.* BILAINKIN.

1952
Dec. 18.

McNair J.

Parliament — Privilege — Communication to Member of Parliament — Communication in breach of court injunction—Unconnected with parliamentary proceedings—Jurisdiction of court to commit for contempt.

The plaintiff, in an action for slander and libel, was granted an interim injunction to restrain the defendant from repeating the alleged libels and slanders. Later the defendant took to the House of Commons five communications which repeated the alleged libels. He delivered one by hand to the messenger of the House of Commons for delivery to a Member of Parliament, and posted the other four in the post office at the House of Commons addressed to other named Members. On application by the plaintiff for an order committing the defendant to prison for breach of the injunction:—

Held, that, since, in particular, the communications were in no way connected with any proceedings in Parliament, they were not protected by parliamentary privilege so as to oust the jurisdiction of the court to commit for contempt.

APPLICATION to judge in chambers for order for committal to prison for contempt of court.

The applicant, Dr. Lilian Rivlin, started proceedings against the defendant, Mr. George Bilainkin, her former husband, for alleged defamation against her, contained in certain statements published by him in a letter to the National Society for the Prevention of Cruelty to Children, concerning the child of the parties, and on October 19, 1951, Donovan J. granted the plaintiff an interim injunction to restrain the defendant from further repetition of the alleged libels and slanders. On April 1, 1952, the defendant applied for the lifting of the injunction on the ground that it was preventing the proper preparation of his case in other proceedings against the plaintiff, but that application was refused. The other proceedings and the appeal against the decision in those proceedings were heard in camera, the defendant being unsuccessful before both courts.

On November 24, 1952, the defendant went to the House of Commons and handed to the messenger of the House five communications for delivery to named Members of Parliament. The communications repeated the matter complained of in the slander proceedings. In accordance with the rule of the House of Commons, the messenger accepted only one of the communications for delivery by hand to Colonel Wigg, M.P., and the defendant posted the other four in the post office within the precincts of the House, from which post office they were delivered to the addressees without being removed from the House.

The plaintiff thereupon applied to the judge in chambers for an order of attachment committing the defendant to prison for breach of the interim injunction granted by Donovan J.

The application was heard in chambers before McNair J., on December 18, 1952, and the hearing was adjourned into open court for judgment. The report of the argument in chambers is published with the permission of McNair J. and by the courtesy of the parties, their solicitors and counsel.

K. E. Shelley Q.C. and *Dennis Lloyd* for the plaintiff. It is submitted that on the affidavits before the court and the copy of the communication to Members of Parliament there has clearly been a deliberate breach of the injunction imposed by Donovan J.

Gerald Gardiner Q.C. and *Morris Finer* for the defendant. The defendant apologizes to the court if he has done wrong; but he acted in the genuine belief and conviction that communications to Members of Parliament in the circumstances did not constitute any breach of the injunction. It is submitted: (1) that there has been no breach of the injunction, because (a) the injunction is one restraining the defendant from publishing any further "libel" or "slander," and this was on any view a publication on a privileged occasion, even though the privilege may have been qualified; therefore prima facie it was not a "libel" or "slander"; (b) it is a privilege of Parliament that all Members are entitled to be approached in the Houses of Parliament by anyone desiring parliamentary action, and anyone who impedes such approach commits a breach of parliamentary privilege: see Erskine May, Parliamentary Practice, 15th ed., p. 131. The publication to a Member of Parliament in the Houses of Parliament is no libel: *Lake* v. *King*[1]; Anson, Law and Customs of the Constitution, Part I, 5th ed., p. 175. If a party, who contends that he has been libelled by Members of Parliament in the Houses of Parliament, brings an action of libel, he commits a breach of parliamentary privilege and will be sent to prison: *Gee's* case.[2] Where a judge insists on trying such an action, he commits a breach of parliamentary privilege and may also be sent to prison: *Jay* v. *Topham*,[3] cited in Erskine May, at p. 155; (c) a court has no jurisdiction over anything which takes place in the Houses of Parliament: *Jay* v. *Topham*.[3] The evidence here shows that everything was done inside the Houses of Parliament: *Bradlaugh* v. *Gossett*[4]; Erskine May, p. 64.

[McNair J. The court is not considering privilege in the ordinary sense but whether or not the court's jurisdiction is ousted by parliamentary privilege.]

(2) The injunction was based only on a publication by the defendant to the N.S.P.C.C. about his own daughter. There has been no previous suggestion of any breach of the injunction. The defendant bona fide believed that publication to a Member of Parliament inside the Houses of Parliament would not be a

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[1] (1667) 1 Saund. 131.

[2] House of Commons Journal 1693/97, 599 and 699.

[3] (1689) 12 State Trials 822.

[4] (1884) 12 Q.B.D. 271.

breach of the injunction. The case therefore is not one in which a committal order should be made.

[McNAIR J. In a case of possible conflict between the courts and Parliament, is there no practice of communicating with Mr. Speaker?]

Shelley Q.C. in reply. This case is distinguishable from those cited because (1) nothing that happened here was part of the proceedings in Parliament. It was a mere accident that the letters were handed in at the House of Commons, and as a matter of substance it did not take place within the precincts. (2) The communication is anonymous; there is not here a genuine case of a person wanting to enlist parliamentary aid. The defendant merely wanted to show it to other people.

[McNAIR J. It is obvious that the defendant wanted a Select Committee to consider his grievance and that the document proceeds from himself.]

(3) Where the order of the court has already been made before any intervention of Parliament takes place, parliamentary privilege cannot be invoked to prevent the court enforcing its order.

[McNAIR J. That must be wrong: see *Wilkes'* case.[5]]

If that submission is too wide, then it is submitted on the narrower ground that where the court has made an order affecting a private person and not affecting Parliament's own proceedings, the court will not be deterred from enforcing its own order by a claim of parliamentary privilege.

McNAIR J. stated the facts and continued:—On examining the document, I am satisfied without any doubt at all that it constitutes quite plainly a repetition of the same accusations against the plaintiff as were the subject-matter of the original injunction granted by Donovan J. on October 19, 1951, and accordingly it is clear in my judgment that it is a libel which falls within the injunction granted by that judge.

It is argued on behalf of the defendant that this court has no jurisdiction to make an order for committal, since the matter complained of, the publication to Colonel Wigg, occurred in the precincts of the House of Commons and was connected with an attempt to obtain parliamentary redress for an alleged grievance.

Having examined the authorities, I am satisfied that no question of privilege arises, for a variety of reasons, and particularly I rely on the fact that the publication was not connected in any way with any proceedings in that House.

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[5] (1763) 19 State Trials 981.

1952

RIVLIN
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McNair J.

The defendant has, however, filed an affidavit in which he alleges that his action in approaching the Members was bona fide, and that he did not realize that it involved any breach of the order in this court, and he makes an apology. In the affidavit he says: "At the time I sincerely believed I was not committing "any breach of the order. Had I thought it was a breach, I "would certainly not have done it as I have no wish to do any- "thing which is in contempt. I respectfully say that I have "not wilfully disobeyed the order, but if it is decided that the "communication was in breach, then I most humbly apologize, "and I ask that in the circumstances I should be excused."

Having given the matter my most anxious consideration, I have decided that I am prepared to accept that expression of regret, and accordingly I will make no order on the application save that the defendant will pay the plaintiff's costs. But the defendant should be warned in no uncertain terms that if anything of this character occurs again, and is brought to the attention of this court, there is no doubt at all that he will be liable to instant committal, and it will not again be open to him to say that he acted in ignorance of his legal rights; and no doubt any judge before whom this matter might come again would bear in mind the warning which I now give him.

Defendant to pay plaintiff's costs.

Solicitors: *Rubinstein, Nash & Co.; Montagu's and Cox & Cardale.*

M. M. H.

REGINA *v.* DAVIES.

C. C. A.

1953
Jan. 14, 26.

Lord Goddard C.J., Croom-Johnson and Pearson JJ.

Criminal Law—Receiving—Evidence of previous convictions—Evidence not to be given when a charge of other offence also relied on—Conviction quashed—Leave to proceed with other indictments on file—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 43 (1).

Where a charge is substantially one of receiving stolen property and the jury are not asked to find a verdict on some other count, evidence under section 43 (1) of the Larceny Act, 1916, of a previous conviction may be admitted. But where there is another charge, whether it be of larceny or of being an accessory after the fact to larceny, on which the prosecution rely, then evidence of previous convictions should not be given.

Rex v. *Ballard* (1916) 12 Cr.App.R. 1 applied.

Dictum in *Rex* v. *Jones* (1948) 33 Cr.App.R. 33, 40; [1948] 2 All E.R. 964 explained.

APPEAL against conviction and sentence.

A headlamp and battery had been stolen by one Cobb, who took them to a café of which the appellant, John James Davies, was the manager. Subsequently the appellant was found in possession of the goods, endeavouring to sell them. He was charged with receiving them knowing them to have been stolen. On his being brought before the examining justices, the prosecution tendered evidence under section 43 (1) of the Larceny Act, 1916,[1] of a previous conviction of his for a similar offence. This was proved by a police officer and included in the depositions.

The appellant was committed for trial at Bedford quarter sessions on a charge of receiving, and the indictment contained only one count. Before arraignment, counsel for the prosecution applied for leave to amend the indictment by adding a count charging the appellant with being an accessory after the fact to larceny. The deputy chairman asked defending counsel if he had any objection to the amendment and he said that he had not, and leave to amend was accordingly given. The evidence of the previous conviction was given, and the appellant's counsel did not object to it. Other evidence showed that the appellant was not at the café when the goods were left there, and there was nothing to show that he knew that they were stolen when he first took possession of them. Eventually the count of receiving was abandoned and a verdict of Not Guilty was returned on it. In his summing-up on the accessory count the deputy chairman warned the jury to ignore the evidence of the previous conviction. The appellant was convicted on this count and sentenced to eight years' preventive detention.

J. C. Burge for the appellant. Although the jury were warned by the deputy chairman to ignore the evidence of the previous conviction when considering the charge of being an accessory, their minds must have been influenced by that evidence in deciding to convict, and the evidence should not have been admitted. *Rex* v. *Ballard*[2] supports this contention.

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[1] Larceny Act, 1916, s. 43 (1): "Whenever any person is being proceeded against for receiving any "property, knowing it to have been "stolen, or for having in his possession stolen property, for the purpose "of proving guilty knowledge there "may be given in evidence at any "stage of the proceedings—(*a*) the "fact that other property stolen "within the period of 12 months "preceding the date of the offence "charged was found or had been in "his possession; (*b*) the fact that "within the five years preceding the "date of the offence charged he was "convicted of any offence involving "fraud or dishonesty."

Niall McDermot for the Crown. It is submitted that where a case is opened as one of receiving, evidence of previous convictions is properly admissible under section 42 (1) of the Larceny Act, 1916, whether or not there are other counts in the indictment: *Rex* v. *Ballard*[2]; *Rex* v. *Jones.*[3] Where there are other counts in the indictment there may be grounds for the defence applying for a separate trial of the other counts or to object to evidence of previous convictions being given if all the counts are tried together. But where no such application is made it is not open to the defence to raise the point on appeal: *Rex* v. *Wattam*[4]; *Rex* v. *Peckham*[5]; *Rex* v. *Firth*[6]; *Rex* v. *Cutter.*[7] Where evidence of previous convictions is given and other counts are included, it is sufficient if the jury are warned to disregard the evidence when trying the other counts: *Rex* v. *Jones.*[8] [Counsel also referred to *Rex* v. *Lee*[9]; *Rex* v. *Joyce*,[10] and *Rex* v. *Hemingway.*[11]]

[LORD GODDARD C.J. This appears to be cutting down the common law and should be carefully watched. The prejudice against the appellant by the admission of this evidence is overwhelming. Leave to amend the indictment should only have been given on condition that no evidence was given of previous convictions.]

Cur. adv. vult.

January 26. LORD GODDARD C.J. [having stated the facts]: The attention of the deputy chairman was called to *Rex* v. *Jones*,[1] a case in which the prisoner was charged both with receiving and being an accessory after the fact to the larcenies, and a previous conviction against the appellant of factory breaking with intent was given. The jury in that case acquitted on the receiving and convicted on the accessory counts. This court quashed the conviction, but not on the ground of the reception of that evidence. In giving judgment Humphreys J. pointed out that advantage had been taken by the prosecution of section 43 of the Larceny Act, 1916, and that they had proved the previous conviction, and said [2]: "This evidence was receivable for the purpose of proving guilty "knowledge on the charges of receiving. There was no specific "direction to the jury that they must disregard it when con-"sidering the charge of being an accessory. It would certainly "have been better that the jury should be so directed, but as "they acquitted the appellant upon the receiving counts to which "it specifically related, we think it unlikely that it affected their "minds upon the other counts."

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[2] (1916) 12 Cr.App.R. 1.

[3] [1948] 2 All E.R. 964; 33 Cr. App.R. 33.

[4] [1942] 1 All E.R. 178; 28 Cr. App.R. 80.

[5] (1935) 52 T.L.R. 159, 160; 25 Cr.App.R. 125, 128.

[6] [1938] 3 All E.R. 783, 786; 26 Cr.App.R. 148, 153.

[7] [1944] 2 All E.R. 337; 30 Cr. App.R. 107.

[8] 33 Cr.App.R. 33.

[9] (1908) 24 T.L.R. 627; 1 Cr. App.R. 5.

[10] (1908) 25 T.L.R. 8; 1 Cr.App.R. 142.

[11] (1912) 29 T.L.R. 13; 8 Cr.App. R. 47.

[1] 33 Cr.App.R. 33.

In the present case, it was apparently contended before the quarter sessions, as it was before us, that this was an authority showing that where there was a charge of receiving and also a charge of being an accessory after the fact, evidence of previous convictions could be admitted provided that a warning was given to the jury that on the accessory counts they must disregard the evidence of previous convictions, and it is only right to say that in his summing-up the deputy chairman did give a strong direction to the jury to that effect. At the same time, the passage which I have quoted in the judgment was obiter, and I think that we may say without any disrespect that the court was not directly considering the admissibility of the evidence where there was a charge of being an accessory after the fact, because they quashed the conviction on quite different grounds.

It is, perhaps, curious that there is not more authority on this point and, indeed, the only other case which affords any assistance is *Rex* v. *Ballard*.[3] In that case there were counts for stealing and receiving. Objection was taken to evidence of previous conviction on the ground that though there was evidence on the stealing count there was none on the receiving count and, therefore, the evidence could not be admitted. In giving judgment the court said [4]: "The section has to be carefully "administered, no doubt, and ought not to be used where there "are counts for both stealing and receiving for the purpose of "getting a verdict on the count for stealing, where the court "cannot exclude the evidence as there is a count for receiving;

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[2] 33 Cr.App.R. 33, 40.

[3] 12 Cr.App.R. 1.

[4] Ibid. 4.

"it might induce the jury to convict of stealing on very slight "evidence. So if the charge is substantially one of stealing, "and not receiving, the evidence ought not to be given." The judgment proceeded,[5] "but the chairman held that he could "not say that the substantial charge was one of stealing, so he "felt bound in law to admit the evidence. The court thinks "that he was right in that view. The jury found the prisoner "guilty of receiving only." In our opinion that case shows the true rule. If the case is substantially one of receiving and is presented to the jury on that footing, so that they are not being asked to find a verdict on some other count, evidence of a previous conviction may be admitted. At the same time, it cannot be admitted where there is another charge on which a verdict is sought, and we think that the only right rule to lay down is that, if the prosecution feel that they cannot confine their case to one of receiving, but must also rely on some other count, be it of stealing or of being an accessory after the fact to stealing, then if they include in the indictment a count for either of those offences they must refrain from giving evidence of previous convictions.

The statutory provision, which originally appeared in the Prevention of Crimes Act, 1871, is in itself a great departure from the ordinary rules which apply to evidence in criminal trials. As is well known, evidence of bad character or previous convictions is not admissible in chief in any other case, and we need not consider the cases in which it may become admissible by way of rebuttal owing to the prisoner putting his character in issue. It is evidence of a most prejudicial kind and is only allowed in receiving cases because the legislature, no doubt, recognized the difficulty which often arises of proving guilty knowledge in receiving cases. In the opinion of the court it must be restricted to those cases. We can well understand that counsel for the defence as well as the deputy chairman may have felt a difficulty in objecting to the evidence because of the passage which I have read in *Jones'* case,[6] but the fact that counsel did not in these circumstances take objection to such evidence ought not, we think, to be regarded as fatal to the appeal.

As we have already said, the deputy chairman gave a strong warning to the jury to disregard the evidence, but it was of so prejudicial a character that no warning could really remove it from the minds of the jury. One often has to tell a jury to

[5] 12 Cr.App.R. 1, 4.

[6] 33 Cr.App.R. 33, 40.

disregard such matters as the statement which one prisoner makes involving another, but there a jury can often see a very good reason for one prisoner trying to throw the blame on another or to see that the other does not escape if he himself is being convicted. Here it is not a mere casual or accidental piece of evidence bearing unfavourably upon the accused person's character. It is a case in which a witness was called to prove, and did prove, a specific conviction. No warning could possibly remove that evidence from the minds of the jury, and, accordingly, the court felt that they had no option but to allow the appeal and quash the conviction.

Other points were raised in the notice of appeal as to whether on the evidence the appellant could properly be convicted as an accessory after the fact. On this we give no decision as it has become unnecessary to do so, and it follows that there is no necessity to consider the sentence, though the court cannot but be somewhat surprised that a sentence of eight years' preventive detention was passed for being an accessory after the fact to what, after all, was not a serious larceny.

MacDermot. I have been instructed to seek the direction of the court whether in the view of this court there is any reason why the prosecution should not proceed on the other two indictments which were left on the file in this case. The reason I mention it to this court is that, although I have believed that it was the normal practice for the prosecution to ask for other indictments to be left on the file where a conviction has been secured on the first, with a view, of course, to their possibly being proceeded with later if an appeal should be successful, there is a case in which this court did express the view that that was not the proper procedure, and that the prosecution ought, at the time when the prisoner is first arraigned, to proceed with all the indictments if it wishes to proceed with them at that stage.

Lord Goddard C.J. For what are the other indictments?

MacDermot. For receiving. They are different transactions and they are substantially later in date.

Lord Goddard C.J. The usual order that is made is that the other indictments, if the prosecution does not go on with them, remain on the file and are not to be proceeded with except on the directions of the court or the Court of Criminal Appeal.

The court sees no reason why, if these indictments have been found, you should not proceed upon them, and we give you leave to proceed if the prosecution are so advised.

Conviction quashed.

Solicitors: *Canter, Hellyar & Co.; Burgess & Chesher, Bedford.*

J. D. P.

RUSHTON *v.* NATIONAL COAL BOARD.

[1950 R. No. 1794.]

C. A.
1953
Jan. 12, 13.

Singleton, Birkett and Romer L.JJ.

Damages—Personal injuries—Loss of arm—Loss of amenities of life not measurable in money—Impossibility of standardizing damages—Guidance from awards in previous cases.

The plaintiff, while working in a coal mine, sustained severe injuries and the loss of an arm through the defendant employers' breach of statutory duty. The defendants provided him with alternative employment, with the result that his actual loss of earnings was relatively small. The trial judge, who, on the plaintiff's claim for damages, expressed the opinion that the loss of amenities of life resulting from the injuries could not really be compensated by money, assessed damages at £10,000. On appeal by the defendants against the amount of damages:—

Held, reducing the damages awarded to £7,000, that in assessing damages for personal injuries, the courts, although they cannot apply any uniform standard, will have regard to and be guided by the general principles which have been applied in decisions in comparable cases.

APPEAL from Byrne J.

On April 18, 1950, the plaintiff, James Rushton, then aged 36, who was employed by the defendants, the National Coal Board, at Cronton Colliery, Lancashire, tripped and fell over a sleeper, and his gloved right hand was caught up in the moving part of an overhead conveyor belt. His right arm with part of the scapula and muscles was torn from his body. In the result he became a one-armed man, and his injury was such that it was impossible to fix an artificial limb as there were no muscles to which to fasten it; he would always have to wear a bandage or pad over the injured part, and would require help in putting it on. He also suffered pain in the phantom limb. The plaintiff also suffered fractures of ribs which caused a pneumothorax followed by pneumonia, and though an X-ray examination showed no disease of the chest, the plaintiff had a cough, and one doctor who gave evidence at the trial said that there was a condition of chronic bronchitis.

The plaintiff was discharged after three weeks in hospital, and after about 11 weeks the defendants offered him work as a clerk at the colliery at a wage about the same as his pre-accident wage in the mine, and about 19s. less than the wage he would have been earning as a labourer in the mine at the date of the trial, namely, £7 5s. After 14 months as a clerk, however, the plaintiff set up a duplicating business of his own, though at the trial it was stated that the clerical position remained open to him.

Before the accident, the plaintiff had intended to make commercial art his main occupation, but after six years in the forces he had had some domestic trouble and had gone to work as a loader in the mine.

The plaintiff brought an action against the defendants claiming damages for negligence and breach of statutory duty under section 55 of the Coal Mines Act, 1911. On June 27, 1952, Byrne J. gave judgment in his favour, holding that the defendants were in breach of the statutory duty which they owed to him. In assessing damages he said that money could not compensate for the plaintiff's loss of enjoyment or the curtailment of his ability to earn his living as a commercial artist, and taking into account, as required by the Law Reform (Personal Injuries) Act, 1948, s. 2 (1), a permanent disability pension of £120 awarded under the National Insurance (Industrial Injuries) Act, 1946, s. 12 (1) (*b*), and the amount the plaintiff was then earning and might earn in the future, he awarded £10,000 damages, including agreed special damages of £83 14s. 4d.

The defendants appealed only against the amount of damages awarded.

Gerald Gardiner Q.C. and *H. S. L. Rigg* for the National Coal Board. The factors to be taken into account are the plaintiff's severe injuries and loss of a limb; his loss of earnings, which are at a very low figure; his age; his loss of the amenities of life; and a disability pension of £120 a year. Byrne J. awarded him £10,000 damages. The disadvantages attendant on the loss of a limb are similar in such cases, but such an injury usually causes a greater loss of earnings than in this case, and that is an important factor. On a study of comparable cases, as reported either in the Law Reports or in The Times newspaper, one finds that the amounts awarded since 1937 at least vary between one-tenth and one-half of what has here been awarded. One also finds that, in the only reported cases in which five-figure sums were awarded, the result to the plaintiff of the injuries suffered has been such that the plaintiff was rendered incapable of leading anything like a normal life, such as the plaintiff here can still lead: see *Heaps* v. *Perrite Ld.*[1]; *Billingham* v. *Hughes.*[2] Compare *Barcock* v. *Brighton Corporation*,[3] where the court awarded £3,767—£3,000 for the loss of a hand and £767 for loss of earnings. See also *Bird* v. *Cocking & Sons Ld.*,[4] where a man aged 65 was left in the position of a man without hands, and Streatfeild J. awarded him £10,000; but this court considered that sum plainly erroneous and excessive. See also *McCarthy* v. *Coldair Ld.*[5]

[Birkett L.J. In that case Denning L.J. said that the court would interfere if on seeing the figure it said to itself: "Good "gracious me—as high as that?"[6]]

The court was referring to the judicial mind and not to what the public would say.

[Singleton L.J. There ought to be three judges engaged on these serious matters. It is almost impossible for a single judge to decide them by himself. Some day there may be an alteration.]

It is submitted that the sum awarded here is quite disproportionate. If it is right, it is such a sum as would prevent this court from interfering in future with awards of £20,000 to £25,000 if, for instance, in addition to the same injuries at the same age, there were a loss of earnings of, say, £1,000 to £2,000 a year. The court has often said, as Byrne J. said here, that no sum of money can ever properly compensate a man for such an injury; but there comes a point at which damages would become astronomical if there were not some limitation of the variations in the award of damages by reference to comparable cases.

[Romer L.J. If the injuries are not susceptible of being measured in terms of money how can one say that any judgment is wrong?]

Logically one cannot, except that there is a sort of "run of "the cases" which enables the court to say: "Whatever might

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[1] [1937] 2 All E.R. 60.

[2] [1949] 1 K.B. 643; 65 T.L.R. 246; [1949] 1 All E.R. 684.

[3] [1949] 1 K.B. 339; 65 T.L.R. 90; [1949] 1 All E.R. 251.

[4] [1951] 2 T.L.R. 1260.

[5] [1951] 2 T.L.R. 1226.

[6] Ibid. 1229.

"be the right amount, this is a wrong one." After research into all the cases reported, this appears to be the largest amount ever awarded for an arm or a hand.

[SINGLETON L.J. I cannot believe it is the highest; perhaps it is merely the highest reported.]

It is not an unfair test here to observe that if this man never worked again, and this money were invested, he would be no worse off than he was and would be left with £10,000 or more at the end. That is not necessarily conclusive, but, if it is so, it is extraordinary. In view of all these factors the amount awarded was inordinately high and the court ought to interfere.

[SINGLETON L.J. The legislature has said that the judge assessing damages is not entitled to take into account the full pension of £120 a year, but must deduct half of it, that is £60, for five years, so that we are entitled to assume that the judge would have awarded £10,300.]

Yes.

E. Wooll Q.C. and *A. D. Pappworth* for the plaintiff. It is submitted that it is impossible to standardize damages, for the circumstances of two different cases are never alike, either as to the nature or the effects of the injury. All that the court can do is to ensure that no factor which ought to have been considered in the assessment of damages has been overlooked and no factor that ought not to be considered has been interpolated. Within those limits it is submitted that the judgment of Byrne J. ought to stand. Old-fashioned judges might have awarded less. My experience with regard to awards of damages in accident cases does not quite coincide with the figures submitted by counsel for the defendants. [Mr. Wooll then gave figures of unreported awards in cases within his own knowledge.]

SINGLETON L.J. stated the facts and continued: It is true, as Mr. Wooll put it, that a man who has been injured is not bound to take every offer of work made to him; but this man after the accident had accepted work as a clerk, and as a clerk did earn, and could have continued to earn, wages almost as high as he was earning at the date of the accident; so that the loss of earnings was only a small part of the loss in this case. The out-of-pocket loss at the date of the trial was only some £83, and that was included in the general award of £10,000 damages.

When damages have to be assessed in a case of this kind there are many elements for consideration: the pain and suffering undergone and that which may occur in the future; the loss of some of the amenities of life; the fact that a man with an injury of this kind will always require some measure of help, even though he may be able to earn considerable money. These are some of the matters which have to be taken into consideration, and another is the fact that his earnings will probably be less than they were before.

Mr. Gerald Gardiner directed our attention to a number of cases which have been decided in the courts recently, and submitted that, however one looked at this case, the award of £10,000 by way of damages was too high and was completely out of line with the decisions of this court and of judges of the Queen's Bench Division recently.

Mr. Wooll rightly pointed out that the circumstances of two different cases were not alike, and that little help was to be gained from looking at what a particular judge gave or what this court awarded in the case of a different injury or an injury of a different kind, and that, however much one tried, it was impossible to standardize damages. There is foundation for Mr. Wooll's remark that it is impossible to standardize damages.

I think myself that the matter was perhaps best put by Birkett L.J. in *Bird* v. *Cocking & Sons Ld.*[1] When the appeal to this court has been against the assessment of damages, we have been reminded time and again that we ought to interfere if the damages were so low that it could be said that there was a wholly erroneous estimate of damages; and, on the other hand, we have been reminded that we ought to interfere if the damages were inordinately high.

Birkett L.J. in *Bird* v. *Cocking & Sons Ld.*[2] said: "The "assessment of damages in cases of personal injuries is, perhaps, "one of the most difficult tasks which a judge has to perform, "and certainly the task is no lighter when the appellate court is "asked to reconsider the assessment made by a judge in the "court below. The task is so difficult because the elements which "must be considered in forming the assessment in any given "case vary so infinitely from other cases that there can be no "fixed and unalterable standard for assessing the amounts for "those particular elements. Although there is no fixed and "unalterable standard, the courts have been making these assess-"ments over many years, and I think that they do form some "guide to the kind of figure which is appropriate to the facts "of any particular case, it being for the judge, or for the appellate

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[1] [1951] 2 T.L.R. 1260.

[2] Ibid. 1263.

"court if they are reviewing the matter, to consider the special "facts in each case; for I agree with Mr. Veale that one case "cannot really be compared with another. The only thing that "can be done is to show how other cases may be a guide, and "when, therefore, a particular matter comes for review one of "the questions is, how does this accord with the general run "of assessments made over the years in comparable cases? "Judging by that test the sum which Streatfeild J. awarded "was quite at variance and was, indeed, much too high."

That passage expresses everything that I would say on the two views put before us in this court as to the use of other cases. It is impossible to standardize damages, but it is the duty of this court, so far as it can, when there is an appeal in this class of case, to see that the general principles are followed so far as possible, so that there may be, again, so far as is possible, the same approach in the cases of all litigants who suffer from personal injuries and for all defendants. More than that the court cannot do. And with that in mind I come back to the facts in this case.

[His Lordship reviewed the injuries sustained by the plaintiff and continued:] Bearing all those things in mind and giving full effect to them, I have reached the conclusion that the sum of £10,000 is much too high, and that it is the duty of this court to reduce it. I cannot bring myself to say that the damages ought to have been more than £7,000.

I would accordingly order that the damages awarded to the plaintiff be reduced from the sum of £10,000 to the sum of £7,000, and I would allow the appeal to that extent.

BIRKETT L.J. I am of the same opinion. This case affords another illustration of the difficulties which attend the assessment of damages where personal injuries are concerned, and the only question in this court has been this difficult question of damages. The House of Lords have used the phrase "a wholly "erroneous estimate of the damage" as one of the grounds on which an appellate court could interfere (*Davies* v. *Powell Duffryn Associated Collieries Ld.*).[3] A phrase used by Lord Simon in a recent case (*Nance* v. *British Columbia Electric Railway Co. Ld.*)[4] was that an appellate court could interfere if "the amount awarded is either so inordinately low or so inordi-"nately high that it must be a wholly erroneous estimate of the

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[3] [1942] A.C. 601, 617; 58 T.L.R. 240; [1942] 1 All E.R. 657.

[4] [1951] A.C. 601, 613; [1951] 2 T.L.R. 137; [1951] 2 All E.R. 448.

"damage," and MacKinnon L.J. in another case (*Greenfield* v. *London & North Eastern Ry. Co.*) [5] spoke of damages being so excessive as to be unreasonable.

How those actual tests are to be applied is always a matter of some difficulty, because I can conceive that anyone hearing the history of this dreadful accident might say that no money could compensate the plaintiff, and that whatever sum a judge awarded could not be inordinately high. Indeed, Byrne J., at the conclusion of his judgment, said: ". . . this is a case in which "money cannot really compensate at all for the loss of enjoy-"ment or the curtailment of his ability to do what he would like "to do in the way of earning a living, and clearly it must be a "case in which the damages are substantial."

If money is no compensation, then £5,000, £10,000, £15,000 or £20,000 become meaningless, but the courts have been compelled by the logic of circumstances to decree that in cases of personal injury the only thing open to the court is to make an award of damages in money. That being so, I still think that it is a most useful thing to look at comparable cases to see what other minds have done, and so to gather the general consensus of opinion as to the amount which a man in a certain state of society ought to be awarded.

Here, as my Lord has pointed out, and, indeed, as Mr. Wooll, who treated this matter so frankly, said, the financial element is the least of all, as indeed it is; and he said that this sum can be justified on the award for loss of amenities, namely, the position of a man who can no longer conduct his life as he would wish to do; a man who in certain matters must always be dependent upon others, and who quite manifestly cannot do the things that he would like to do, such as running, playing cricket or football and taking part in athletic exercises. Mr. Wooll said that disregarding or treating the financial side as a minor matter, the sum could be justified because of the loss of amenities and the pain and suffering endured and still to be endured.

Having given this case anxious consideration, I have come to the same conclusion as my Lord. If one were freely to say, "Money can be no compensation," then awarding £10,000, £15,000 or £20,000 would be one thing; but this court, while it regards the decisions of the past, must also have regard to the future and the effect that its decisions might possibly have in that direction; and taking all these matters into consideration, looking at the past cases, the general standard, and the particular facts in this case, I concur in the opinion that this sum is too high, and should be reduced to £7,000.

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[5] [1944] 2 All E.R. 438, 440.

ROMER L.J. I also agree. In the passage cited by my Lord, Byrne J. summarized his conclusion on the question of damages by intimating that it was obvious that money could not be regarded as compensation to the plaintiff. Accordingly, this is one of the many cases where the court in effect is being asked to measure the immeasurable, because, except with regard to financial loss, such as loss of earnings, damages cannot constitute actual compensation, whether £50,000 or £100 be awarded. But the principle has been adopted (and it is the only possible principle which can be adopted) of trying to compensate a man in the plight in which this plaintiff finds himself by awarding what may fairly be described as notional or theoretical compensation to take the place of that which is not possible, namely, actual compensation. In the application of that principle the court should plainly, so far as possible, apply it with some degree of uniformity. One can only say "so far as possible," because nothing in the nature of any rigid classification can be achieved when one is dealing, not with fact, but with theory; and the only way, so far as I can see, in which one can achieve anything approaching a uniform standard, is by considering cases which have come before courts in the past and seeing what amounts were awarded in circumstances so far as may be comparable with the case which the court has to decide.

In the light of the guide afforded by the authorities to which we have been referred, it does seem to me that the £10,000 awarded in the present case is out of line with the standard which has in general been adopted in the past, and deviates from that standard to such a degree that I agree that the award cannot be sustained, and that £7,000 is the sum which should be awarded, and which would be in conformity with the trend of previous decisions. I therefore agree with the order which has been proposed.

Appeal allowed.
Award of damages reduced from
£10,000 *to* £7,000.

Solicitors: *R. S. S. Allen for C. R. Hodgson, Manchester; Mawby, Barrie & Letts for Silverman & Livermore, Liverpool.*

M. M. H.

REGINA *v.* NORFOLK QUARTER SESSIONS.
Ex parte BRUNSON.

1953
Jan. 20.

Lord Goddard C.J., Croom-Johnson and Pearson JJ.

Criminal Law—Evidence—Evidence before examining justices—Effect of inadmissible evidence on committal order—Witness—Arrested with prisoner but later released—Competence—Indictable Offences Act, 1848 (11 *&* 12 *Vict. c.* 42), *s.* 17.

Provided that examining justices comply with the requirements of section 17 of the Indictable Offences Act, 1848, the fact that certain evidence taken before them is inadmissible does not vitiate an order for committal.

A father and son were arrested on a charge of stealing a motor car and were released on bail at the police station. Later they were notified that their recognizances were at an end and that their presence at the police station was no longer required. Subsequently the father was arrested and an information was preferred against him charging him with receiving the motor car. When the father was brought before the examining justices, the son was called as a witness, and the father was committed to quarter sessions for trial. At the trial it was submitted that the committal order was bad because the son was an incompetent witness before the examining justices, there being a charge still pending against him:—

Held, that, even assuming that the son was an incompetent witness and his evidence was inadmissible, the committal was nevertheless good and quarter sessions were entitled to try the case.

Rex v. *Grant* [1944] 2 All E.R. 311, and *Rex* v. *Sharrock* [1948] 1 All E.R. 145, disapproved.

Semble, in any event no charge had been preferred against the son which made it improper for him to be called as a witness in the case.

Per Pearson J.: I am not satisfied that the son could be said to have been charged for the purposes of this case until an information had been laid.

Motion for orders of certiorari and mandamus.

On May 24, 1952, Harry Fletcher, the owner of a garage at Ickburgh, Norfolk, was arrested together with his son, Michael Fletcher, at Thetford, Norfolk, in connexion with the theft of an army Austin motor car from barracks at Colchester. On the same day both father and son were handed over to the Essex police, when both men were charged with stealing the motor car and were released on bail by the superintendent of police. On June 5, 1952, both men were informed that the bail notices served on them, which instructed them to appear at the Colchester police station, had been cancelled. Subsequently Harry Fletcher was arrested by the Norfolk police, and on July 2, as a result of an information laid by George Brunson, an inspector of police in the Norfolk constabulary, the accused was brought before the examining justices sitting at Methvold, when his son was called as a witness, and the father was committed for trial at Norfolk quarter sessions on a charge, inter alia, of receiving the Austin motor car.

At the hearing before quarter sessions on July 30, 1952, counsel for Harry Fletcher submitted that the order committing him (Fletcher) for trial was unlawful on the ground that Michael Fletcher had been called as a witness for the prosecution before the examining justices when he himself at one time had been charged with the theft of the car, and that that charge had not been lawfully disposed of. Quarter sessions accepted that submission, quashed the indictment and awarded the accused the costs of his defence. The applicant, George Brunson, now moved, first, for an order to bring up and quash those orders of quarter sessions, and, secondly, for an order of mandamus requiring quarter sessions to hear and determine the indictment preferred against Harry Fletcher.

Gerald Howard Q.C. and *F. P. Keysell* for the applicant. In arriving at their decision that the committal was bad quarter sessions were influenced by the decision in *Rex* v. *Grant*,[1] which was followed in *Rex* v. *Sharrock*.[2] But it was laid down in *Winsor* v. *Reg*.[3] that where two persons are jointly charged with an offence, but one only is proceeded against, the other is an admissible witness for the prosecution. [Counsel also referred to *Bradlaugh* v. *Reg*.[4]] Here, Michael Fletcher was not even on a charge. All that the police officer did was to tell him why he had been arrested.

Adrian Head for Harry Fletcher. Michael Fletcher was charged within the meaning of section 3 of the Evidence Act, 1851, and, therefore, he could not be called by the prosecution until either a nolle prosequi was entered or he was acquitted or convicted. Section 17 of the Indictable Offences Act, 1848, implies that the person examined by the justices was capable of being a witness by law. If the provisions of section 17 were not complied with, the committal was bad: *Rex* v. *Gee*.[5] The justices must commit on the whole evidence. It was not competent for them to commit on evidence partly receivable and partly not receivable.

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[1] [1944] 2 All E.R. 311.

[2] [1948] 1 All E.R. 145.

[3] (1866) L.R. 1 Q.B. 289.

[4] (1883) 15 Cox C.C. 217.

[5] [1936] 2 K.B. 442; 52 T.L.R. 473; [1936] 2 All E.R. 89.

[LORD GODDARD C.J. referred to the history of section 17 of the Act of 1848 as contained in Steven's History of the Criminal Law of England, Vol. 1, p. 216 et seq.]

There is an obligation on the police to take a person arrested without a warrant before the justices.

[PEARSON J. Section 38 (2) of the Summary Jurisdiction Act, 1879, added by section 45 of the Criminal Justice Act, 1925, does not seem to indicate that.]

[LORD GODDARD C.J. Why should not a police officer, who has arrested a person, discharge him on finding that no offence has been committed? I cannot see that he has a legal duty to take the person before the justices.]

Lionel Thompson for the justices did not address the court.

LORD GODDARD C.J. The circumstances of this case, to say the least of it, are unusual, and Mr. Head's courageous argument which succeeded before the court below has been repeated here, and if we gave effect to it I tremble to think what would be the result to the criminal practice of this country. What is suggested, so far as I know, has never been the law, and in all the years I have been in the profession I have never heard it adumbrated.

In May, 1952, an Austin motor car was stolen from some barracks at Colchester. The next that was known about that car by anybody in authority was that on May 24 it was at a garage, somewhere near Thetford, which was owned by Harry Fletcher. The Norfolk police made inquiries, and Fletcher's account was such that the police had good ground for arresting him. Accordingly, they arrested him, and also his son, Michael Fletcher, who was suspected by them of having been concerned in the theft with his father. Both father and son were then handed over by the Norfolk police to the Essex police, and were taken to Colchester police station. At that stage there is no doubt that they had been taken into custody for an offence without warrant, the police having reasonable grounds for suspecting that a felony had been committed and that they had committed it. At Colchester the superintendent of police exercised his powers and his duty under the Summary Jurisdiction Act, 1879, and bailed these two men. Section 38 (2) of the Act, as added by section 45 of the Criminal Justice Act, 1925, provides: "If, on "a person being so taken into custody as aforesaid [without a "warrant], it appears to the superintendent, inspector or other "officer aforesaid that the inquiry into the case cannot be completed forthwith, he may discharge the said person on his "entering into a recognizance, with or without sureties for a "reasonable amount to appear at such police station and at such "time as is named in the recognizance, unless he previously "receives notice in writing from the officer of police in charge of "that police station that his attendance is not required, and any "such recognizance may be enforced as if it were a recognizance "conditioned for the appearance of the said person before the "court of summary jurisdiction." In other words, he is told not to appear before a court of summary jurisdiction, but to go to the police station unless he is told that he need not, the object of course being to enable the police to make further inquiries into the case and decide whether they are going to bring the man before the court or not.

In the present case the Essex police decided not to go on with the case. They therefore gave notice to both Harry Fletcher and his son that their recognizance was at an end and that their presence at the police station was no longer required. Thereupon, so far as the Essex police were concerned, there was an end of the matter. Subsequently Harry Fletcher was arrested by the Norfolk police, and an information was preferred against him which resulted in his being brought before the examining justices at Thetford. No charge was then made against Michael Fletcher, but he was called as a witness before the justices. The father was then committed for trial. At the Norfolk quarter sessions Mr. Head took the point that the committal was bad because, he said, Michael Fletcher was an incompetent witness, there being still a charge pending against him, and as the charge was pending against him he could not be called as a witness before the justices. Therefore, it was argued, the justices had no right to hear him, and as they had heard him the committal was bad.

It is not necessary for us to go into the question whether a charge had been preferred against Michael Fletcher or not, but I am clearly of opinion that no charge had been preferred which made it improper for him to be called as a witness in the case. He had been taken into custody and released on bail, and the police had told him that he need not surrender. But this case has great importance because if we had to give effect to Mr. Head's submission and uphold the Norfolk quarter sessions it would mean, so far as I can see, that if any inadmissible evidence is given before justices when they are acting as examining justices, that vitiates the committal. It is true that a judgment given on circuit by Birkett J. in *Rex* v. *Grant*,[1] when he had not, I should think, had the advantage of as full an argument with cases being cited as we have had, seems to have been to that effect, and his judgment was followed by Lewis J. in *Rex* v. *Sharrock*.[2] But just consider what it means. If a committal is to be vitiated because an incompetent witness has given evidence, which means that the evidence was wrongly admitted, it would follow that a committal could always be objected to if it could be shown that there was something on the depositions which could not be legally admitted as evidence. I think *Grant's* case [3] is perhaps to be explained by the fact that Birkett J. strongly disapproved of what had been done in that case and thought that the witnesses who had been called were very likely called in a way that was unfair, or it might have been that they were put in the position of having to incriminate themselves.

Mr. Howard referred us to *Winsor* v. *Reg.*[4] in which it was expressly decided by a court of the highest authority—the Exchequer Chamber upholding the decision of the Queen's Bench—that if two people were indicted together, although it is an undesirable practice, and I have no doubt nowadays that it would never be allowed, there was nothing in law to prevent the Crown calling one prisoner as a witness for the Crown though the proceedings against him had not been determined. It may be that the Criminal Justice Act, 1948, has put difficulties in the way of that case being followed, but we need not consider that, because I am willing to admit for the purposes of this argument that Michael Fletcher could not have been called. He was called before the justices and his depositions were taken. It may well be that at the trial objection could have been taken to his evidence, but the words of section 17 of the Indictable Offences Act, 1848, are: "In all cases where any person shall appear or be brought before "any justice or justices of the peace charged with any indictable "offence, . . . such justice or justices, before he or they shall commit such accused person . . . for trial, or before he or they shall "admit him to bail, shall, in the presence of such accused person, "who shall be at liberty to put questions to any witness produced "against him take the statement on oath or affirmation of "those who shall know the facts and circumstances of the case, "and shall put the same into writing, and such depositions shall "be read over to and signed respectively by the witnesses who shall

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[1] [1944] 2 All E.R. 311.
[2] [1948] 1 All E.R. 145.
[3] [1944] 2 All E.R. 311.
[4] (1866) L.R. 1 Q.B. 289, 390.

"have been so examined, . . ." As I said during the argument, the history of that section is that for the first time it took the place of the statutes which were passed in the reign of Phillip and Mary which regulated the procedure before justices. There were two statutes, one, 1 & 2 Ph. & Mar. c. 13, concerned with bailable and the other, 2 & 3 Ph. & Mar. c. 10, concerned with non-bailable offences. In those days the duty of a justice when a person appeared before him charged with an offence was, first, to examine the prisoner, which of course cannot be done now, and reduce any information he could obtain from the prisoner into writing. Then, but not in the presence of the prisoner—that was never allowed—he examined any witnesses or persons who should know the facts and circumstances of the case. Having taken their statements, which were, no doubt, in those days referred to as depositions, but which of course were not the same as depositions at the present time, they sealed them and sent them with a writ of mittimus to be used at the assizes, and one of the principal pieces of evidence was the prisoner's statement, if any, before the justice. Those statutes remained in force until 1848.

By that time there was a great diversity of practice among justices in favour of the prisoner, but in 1848 the Indictable Offences Act was passed which prescribed what was to be done by committing justices. They were to take the depositions in writing in the presence of the prisoner, who was entitled to cross-examine. If the provisions of section 17 of that Act are not complied with, then, as the Court of Criminal Appeal decided in *Rex* v. *Gee*,[5] the committal is bad. In that case, instead of taking depositions in the way prescribed by the Act, statements had been obtained from witnesses and they were read over in court. Speaking for myself, I would have thought it a good thing if something like that could be permitted by a statute because it would save an enormous amount of time, but it is not permitted and we said that the committal was bad. But no court has suggested that, because justices in taking depositions have heard a witness who, it turns out, was objectionable on some point or another, that vitiates the committal. The committal takes the place of the form of presentment by grand jury, who could hear what evidence they liked, or no evidence. Now the matter is dealt with by section 2 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, which makes a committal by justices equivalent to a presentment by grand jury. Therefore, as long as it is shown that justices have acted in accordance with the Indictable Offences Act, 1848, a committal by them is a good committal. Whether the evidence that has been given before the justices will be admitted at the trial is quite another matter.

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[5] [1936] 2 K.B. 442.

If we gave effect to the argument which has been advanced in this case, or followed or did not disapprove of the cases of *Grant*[6] and *Sharrock*,[7] it must follow that any evidence given before justices which the court of trial came to the conclusion was inadmissible, would vitiate the whole committal, because I cannot see the difference between the admission of evidence of a witness which is objectionable or an objectionable witness giving evidence, and by "objectionable" applied to a witness I mean incompetent. Of course, there are incompetent witnesses at the present day. In *Reg.* v. *Boucher*,[8] in which a wife had been called to give evidence against her husband on a charge of larceny, the Court of Criminal Appeal quashed the conviction, although objection had not been taken in the court below, on the ground that the evidence of the woman was that of an incompetent witness. She had also given evidence before the justices, but no one had suggested that the committal was bad.

In the present case there was no ground upon which the quarter sessions could refuse to try the indictment. Their order quashing the indictment was wrong and must be quashed, and the order giving costs, and mandamus must go to them to hear and determine the case.

Croom-Johnson J. I am of the same opinion. If the argument which has been advanced is right, and the committal was bad, that does not mean that the prisoner of necessity goes free. Quarter sessions can, in a proper case, send the matter back to the justices to hear evidence in accordance with the statute under which the committal takes place. I cannot see that there is anything in any evidence which Michael Fletcher might have given at the trial at quarter sessions which could be said to be inadmissible. However, I need not put it as high as that. It seems to me that the mere circumstance in which he was released by the superintendent of police cannot in the least affect his competence to give evidence. Whether it was desirable that he should be called to give evidence is a wholly different matter. It is true that, subject to certain safeguards, a prisoner on trial is not permitted to give evidence on behalf of the prosecution against a fellow prisoner unless it is clearly established that the proceedings against him have come to an end, either by his being acquitted or by his pleading guilty and being dealt with by the trial tribunal, but I am quite at a loss to understand how, in the circumstances, Michael Fletcher was in the least incompetent as a witness. I agree with the judgment proposed by my Lord.

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[6] [1944] 2 All E.R. 311.

[7] [1948] 1 All E.R. 145.

[8] (1952) 36 Cr.App.R. 152.

Pearson J. I also agree with the judgment proposed, and I agree with the reasons given by my Lord. To my mind the short point here is that it is not shown that there was any infringement, in the taking of the depositions, of the provisions of section 17 of the Indictable Offences Act, 1848. The requirement there is that the justices shall take the statements on oath or affirmation of those who should know the facts and circumstances of the case. That wording, especially having regard to the history of the section which has been described, seems to me very different from other wording, which might have been that they should take the evidence in accordance with the rules of evidence of only such witnesses as would be admissible according to the rules of evidence at the trial. The section contemplates, to my mind, a much less formal inquiry than that. It is the object to take the depositions of those who should know the facts and circumstances of the case, and it is not in the least established here that there was any infringement of that provision.

The second observation I want to make is that I thought Mr. Head's argument might depend to some extent on definite meanings which might be given to the word "charged." A prisoner may be, in a sense, charged at the moment when the policeman arrests him without warrant on suspicion of felony, and there is some obligation to inform the arrested person for what he is being arrested. That might be in some sense described as putting him on charge. Then there may be further action taken by the police at the police station in accordance with the ordinary usages of the police. But it does not in the least follow that what happens at those earlier stages makes the man charged in the most relevant and material sense—namely, in the sense that an information has been laid against him so that the proceedings against him in court or in connexion with the court have at that stage been started. I am not satisfied that he can be said to be charged, for the purposes of this case, until an information has been laid. As I have said, I agree with the first judgment that has been given, and, therefore, I agree that the orders should issue.

Orders of certiorari and mandamus.

Solicitors: *Ford, Michelmore, Rose & Binning, for T. E. Rudling & Co., Thetford; Peacock & Goddard, for Reed, Wayman & Walton, Downham Market; Sharpe, Pritchard & Co., for H. Oswald Brown, Norwich.*

J. D. P.

BULLARD *v.* CROYDON HOSPITAL GROUP MANAGEMENT COMMITTEE AND ANOTHER.

1953
Feb. 11, 12.

Parker J.

[1952 B. 3135.]

National Health Service—Hospital management committee—Negligence—Whether action maintainable against committee—National Health Service Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *ss.* 13, 72*—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *s.* 265.

Section 72 of the National Health Service Act, 1946 (which applies section 265 of the Public Health Act, 1875, and adds to the number of authorities therein specified, inter alia, a hospital management committee), does not protect such committee or any person acting under its direction, though acting bona fide for the purpose of executing the National Health Service Act, from liability for an act done negligently by or on behalf of the committee which results in loss or injury to any person.

Davis v. *Board of Management for Glasgow Victoria Hospital,* 1950 S.C. 382, not followed.

PRELIMINARY point on pleadings in action.

On January 30, 1952, the infant daughter of the plaintiff, Stanley Bullard, died of peritonitis, following an operation in the Mayday Hospital, Croydon. The plaintiff, as administrator of her estate, brought an action against the Croydon Hospital Group Management Committee and H. A. L. O. Latta, the surgical registrar at the Mayday Hospital, claiming damages to the estate of his daughter on the ground of the alleged negligence of the defendants. By their defences both defendants denied negligence. The first defendants raised the point that no action would lie

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against the hospital committee by reason of the provisions of section 72 of the National Health Service Act, 1946,[1] and on January 22, 1953, the master directed that that issue should be tried as a preliminary point.

Michael Hoare for the first defendants. It is submitted that the present action is not maintainable against the hospital management committee. Section 72 of the National Health Service Act, 1946, incorporates section 265 of the Public Health Act, 1875, with the result that among the authorities who are afforded protection by that section is now included a hospital management committee. The section provides, therefore, that such a committee, and any member or officer thereof, are not to be personally liable for anything done bona fide for the purpose of executing the National Health Service Act. "Person" is defined in section 4 of the Act as including "any body of persons, whether "corporate or unincorporate," and it follows that a hospital committee, acting in good faith for the purpose of executing the Act, is not liable for negligence simpliciter. This might appear to be contrary to section 13 of the Act, which provides that a hospital management committee, although exercising functions on behalf of a regional hospital board, "shall be liable in respect "of any liabilities incurred (including liabilities in tort)," but there is nothing in that section with regard to the authority acting bona fide, and it is submitted that its operation is confined to cases in which a committee is not so acting. The only case dealing with the point now raised is the Scottish case, *Davis* v. *Board of Management for Glasgow Victoria Hospital*,[2] where it was held that a hospital management committee was not liable for its own negligence in appointing an incompetent nurse, since that would be an act done in the bona fide execution of the National Health (Scotland) Act, 1946, which incorporates section 166 of the Public Health (Scotland) Act, 1897, a section in terms similar to those in section 265 of the Public Health Act, 1875, and also includes a section similar to section 13 in the English National Health Service Act. It is submitted that that decision correctly lays down the law and should be followed in the present case. [He also cited *Regina* v. *The Inhabitants of Haughton*.[3]]

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[1] National Health Service Act, 1946, s. 13: ". . . a hospital management committee shall, notwithstanding that they may be exercising "functions on behalf of the regional "hospital board, be entitled to enforce "any rights acquired, and shall be "liable in respect of any liabilities "incurred (including liabilities in "tort), in the exercise of those functions, in all respects as if the board "or committee were acting as a principal, and all proceedings for the "enforcement of such rights or "liabilities, shall be brought by or "against the board or committee in "their own name."

S. 72: "Section 265 of the Public "Health Act, 1875 (which relates to "the protection of members and "officers of certain authorities) shall "have effect as if there were included "among the authorities therein "referred to a regional hospital "board, the board of governors of "a teaching hospital, a hospital "management committee, a local "health authority and an executive "council, and as if any reference in "that section to the Public Health "Act, 1875, included a reference to "this Act."

Public Health Act, 1875, s. 265: "No matter or thing done, and no "contract entered into by any local "authority or joint board or port "sanitary authority, and no matter "or thing done by any member of "any such authority or by any officer "of such authority or other person "whomsoever acting under the direction of such authority, shall, if the "matter or thing were done or the "contract were entered into bona fide "for the purpose of executing this "Act, subject them or any of them "personally to any action, liability, "claim, or demand whatsoever; and "any expense incurred by any such "authority, member, officer or other "person acting as last aforesaid, shall "be borne and repaid out of the fund "or rate applicable by such authority "to the general purposes of this "Act . . ."

H. T. Buckee for the plaintiff. An action is maintainable against the hospital management committee. Sections 139 and 140 of the Public Health Act, 1848 (otherwise known as the Health of Towns Act), are similar to sections 264 and 265 of the Public Health Act, 1875, and cases decided under the Act of 1848 are of assistance in deciding the question now raised. It is submitted that the decisions in *Newton* v. *Ellis*[4]; *Arthy* v. *Coleman*[5]; *Southampton and Itchin Bridge Co.* v. *Local Board of Southampton*[6]; *Penny* v. *Wimbledon Urban Council*,[7] and *Mersey Docks Trustees* v. *Gibbs*[8] support the view that section 140 of the Act of 1848 (section 265 of the Act of 1875) does not prevent a local board or other authority from being sued for negligence simpliciter. Addison on Torts, 7th ed., p. 732, correctly states the law as follows: "In most statutes relating to public works, "provisions are to be found exonerating the board, commissioners "or trustees, and their subordinate officers from personal liability "in respect of any matter or thing done bona fide for the purpose "of executing the Act, and in some cases the saving clause is "added, 'unless the action, suit, damages, costs and charges "'have arisen in consequence of wilful neglect or default on the "'part of the commissioners or party incurring the same.'" It is submitted that on the authority of *Arthy* v. *Coleman*[9] the

[2] 1950 S.C. 382.

[3] (1853) 1 E. & B. 501.

[4] (1855) 5 E. & B. 115.

[5] (1857) 30 L.T.(o.s.) 101.

[6] (1858) 8 E. & B. 801.

[7] [1899] 2 Q.B. 72; 15 T.L.R. 348.

[8] (1866) 11 H.L.C. 686.

[9] 30 L.T.(o.s.) 101.

words " and without negligence " should be read into section 265 after the words " bona fide." Finally, section 13 of the National Health Service Act specifically makes a hospital management committee liable for a tort committed in the exercise of its functions under the Act, and there is nothing in the section which suggests that such liability is confined to cases in which it has acted mala fide.

Michael Hoare in reply referred to *Tozeland* v. *West Ham Union.*[10]

PARKER J. stated the facts, read section 72 of the National Health Service Act, 1946, and section 265 of the Public Health Act, 1875, and continued:—It is argued on behalf of the first defendants that, omitting irrelevant words, section 265 of the Act of 1875, as applied to the first defendants, reads as follows: " No " matter or thing done by . . . any hospital management com- " mittee . . . shall, if the matter or thing were done . . . bona " fide for the purpose of executing " the National Health Service Act " subject them . . . personally to any action," and it is said that those words are plain and say quite clearly that this body, the hospital management committee, cannot be sued. In that connexion it is pointed out that " person " is defined in section 4 of the Act as including " any body of persons, whether corporate " or unincorporate."

This is clearly a novel point. Heretofore it has been a common practice—and has been understood to be the right practice—in such cases to sue the hospital management committee, and to sue the committee rather than the Minister, on whose behalf, presumably, the management committee act. The fact that it is a novel point does not, of course, mean that it is a bad one. It is clearly a matter which requires investigation.

I should say at the outset that if the contention raised by the first defendants is right, it produces an extremely strange result having regard to section 13 of the National Health Service Act, because that section, in effect, provides that a hospital management committee shall, " notwithstanding that they may be " exercising functions on behalf of the regional hospital board," who, in turn, act for the Minister, " be entitled to enforce any " rights acquired, and shall be liable in respect of any liabilities " incurred (including liabilities in tort), in the exercise of those " functions." It would be a very strange result if the effect of the later section, section 72, was to say that notwithstanding what was said in plain words in section 13 the management committee could not be sued. It is only right to say, however, that on Mr. Hoare's argument those two sections are not wholly irreconcilable, because section 265 of the Public Health Act applies only to cases where the authority has acted bona fide in the execution of the Act and, accordingly, on his argument, there would still be room for section 13 to operate in what no doubt would be the extremely exceptional case of a management board acting mala fide. I think it right to point that out, because I could only accede to Mr. Hoare's argument if I was driven to do so by very clear words negativing, in effect, what is provided by section 13 of the National Health Service Act.

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[10] [1907] 1 K.B. 920; 23 T.L.R. 325.

I derive some help from considering the Public Health Act, 1848, which the Public Health Act of 1875 repealed and replaced. But before referring to the earlier Act, I should point out that section 264 of the Act of 1875 provided quite clearly that it was possible to sue a local authority. That section provided that "a writ or process shall not be sued out against or served on "any local authority, or any member thereof . . . for anything "done or intended to be done or omitted to be done under the "provisions of this Act" until notice had been given, and there follows a provision that proceedings must be begun within six months of notice of the cause of action, which was repealed and replaced by the Public Authorities Protection Act of 1893. So it is to be observed that section 265 was preceded by a section which clearly contemplated the local authority being sued. It is also relevant to point out that in section 308 provision is made for compensation to be paid to persons who are injured or damaged by, in effect, the exercise by the local authority of its statutory powers.

As I have said, the Act of 1875 repealed and replaced the Public Health Act of 1848, and the equivalent sections of the latter Act are: section 139, which was dealing with the notice of action and the limitation of the action; section 140, which is in very similar words to section 265 of the Act of 1875; and section 144, dealing with compensation and equivalent to section 308 of the Act of 1875.

Under the Act of 1848 there have been a number, albeit not a large number, of decisions. Mr. Buckee referred me, amongst others, to *Arthy* v. *Coleman*,[1] which was tried by Willes J. in Essex. In that case a contractor employed by a Board of Health had, it was alleged, been negligent in digging a hole and leaving it unlighted. He was clearly acting under the direction of the Board of Health and he sought to rely on section 140 of the Act of 1848. Willes J. directed the jury that in order to avail himself of that defence the defendant must satisfy them that he had executed the work bona fide under his employment, and not with recklessness or carelessness. There was then a motion to the Court of Queen's Bench for a new trial, and Lord Campbell C.J., after considering the questions of negligence and contributory negligence, continued as follows [2]: "The next question then is, "against whom the action should be brought? The defendant "was employed by the Board of Health to do a particular act, "viz., to dig a hole for a well. The defendant might have done "that with his own hands, but he employed two servants to do it. "They dug the hole in the highway. What they did he did; "what they omitted to do, he omitted to do. They allowed the "hole to remain during the night without a light to warn people "of the danger. That was negligence in them, and it was also "negligence in him, and unless some statute absolved him, he "is liable for the consequences. It is said that the Health of "Towns Act"—which was another name for the Public Health Act of 1848—"absolved him. It would be very strange indeed if "there was such an enactment, viz., that persons guilty of "negligence, whereby their fellow-subjects suffered grievous "injury, shall be indemnified, and that others who are in no way "culpable, and know nothing of the act, and on whom no obligation to guard against it rested, shall be liable, and shall be "called upon to compensate the injured party. There is no such "enactment in the Health of Towns Act, and no authority for "any such position in the cases cited. The maxim respondeat "superior does not absolve the inferior, if by his negligence a loss "has been sustained. Where there is no negligence in the party "who acts in obedience to the instructions of the Board of Health, "he is not liable; but if in doing the act he is guilty of negligence, "whereby loss and damage are occasioned to another, he is "personally liable. The case of *Newton* v. *Ellis* [3] is no authority "for the argument that the party who is guilty of the negligence "shall not be answerable. That case only decided that the party "liable was entitled to notice of action."

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[1] 30 L.T.(o.s.) 101.

That case is authority, at least, for this: that a person is not absolved under this section merely because he acted bona fide, and if a person is not absolved, presumably the authority itself is not absolved merely because it has acted bona fide. If one accepts the direction of Willes J. in *Arthy* v. *Coleman*[4] (which was approved in the Court of Queen's Bench) the act must not only be bona fide but "done without recklessness or "carelessness."

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[2] 30 L.T.(o.s.) 101.

[3] 5 E. & B. 115.

In a later case in 1858, *Southampton and Itchin Bridge Co.* v. *Local Board of Southampton*,[5] the plaintiff company sought to hold the Local Board of Health for Southampton liable in negligence in the construction and maintenance of a sewer, and a number of points were taken on behalf of the local board of health including the point that the action did not lie by reason of section 140 of the Act of 1848. It is to be observed that in the argument for the local board, the first point taken was that they were wrongly sued and that they ought to have been sued by their clerk, and then the second point was taken in this way[6]: "Secondly, though the defendants be sued by a sufficient "description, yet no such action as this is lies against a Local "Board of Health at all. The ground of complaint alleged in "the declaration must be either that an act has been done "which is wholly beyond the statute, or that an act has "been done under the statute. If it be an act wholly beyond the "statute, as an injury done by the defendants or ordered to be "done malâ fide, those persons who did it or ordered it to be done "should have been sued individually. If it be within the "statute, that is, an act bonâ fide intended to be properly done "under the powers of the statute, but so improperly done "as wrongfully to injure the plaintiffs, the only legal "remedy of the plaintiffs is to obtain full compensation under "section 144 . . . "—which was the compensation that I have referred to—"For, if such an injury be done as is last described, "it is expressly declared by section 140 that no action shall "be maintainable against the local board, or any individual "of it, for any act done bonâ fide for the purpose of executing "the Act."

Crompton J. then read the terms of section 140 and said: "Does that protect the local board from being liable to be sued "as a board for negligence, though committed in the doing of "some bonâ fide act? Does it say more than that no member "of the board shall in such case be personally liable?" Pausing there, it is to be observed that there is adumbrated an interpretation of section 265 of the Public Health Act, 1875, which is, in effect, this: that what section 265 is doing is to exclude the personal liability of any members.

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[4] 30 L.T.(o.s.) 101.

[5] 8 E. & B. 801.

[6] Ibid. 805.

Later, Wightman J. interposed with a reference to section 144 of the Act of 1848, the compensation section, and said[7]: "Does section 144 apply to the case of an act which, though "it be done under the statute, is negligently done; or does it "apply only to acts rightfully and rightly done under the "statute, but to the injury of certain individuals?"

For the plaintiffs it was argued that section 140 only exempted members of the board from personal liability. When one comes to the judgment, Lord Campbell C.J. does not expressly consider section 140 at all. He said that the liability of the board must depend on the statute creating it, and goes on to say[8]: "Looking to the statute in question, it "seems to me that the Local Board of Health thereby created "is therein considered to be liable for a wrong such as is "charged in this declaration," and that was negligence. Then he went on: "I am clearly of opinion that such a wrong is not "within the compensation clause, section 144."

Wightman J. said[9]: "It is said, on behalf of the defen"dants, that no such action lies in such case against the board, "but should be brought, if against any one, against the "individuals who ordered that particular work. The decision "depends upon the construction of the statute. Assume work "injurious to an individual to be done by an agent of the "board by order of the board, and the jury to find that the "work was ordered and done bonâ fide in execution of the Act, "then by section 140 the agent is not to be personally liable, "nor are the members of the board to be individually liable; "and, if an action be brought either against the agent or any "member of the board individually, his expenses are to be "paid out of the rates: then the rate-payers are ultimately "liable. It does not seem to be a greater hardship on them "to say that an action may be brought against the board, and "that the damages may be paid out of the general rate."

Then, at the end of his judgment he said: "These enact"ments seem to assume that an action for wrong"—"these "enactments," amongst others, being the preceding section 131— "may be brought against a Local Board of Health, and that the

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[7] 8 E. & B. 801, 807.

[8] Ibid. 812.

[9] Ibid. 813.

"Local Board of Health may plead to such action. Then this "declaration is primâ facie sufficient, and must be answered by "plea. It is unnecessary to decide now what fund, if any, is "liable to pay the damages." Crompton J. said[9]: "Looking at "the whole of the statute, it seems to me that it contemplates "that actions of this nature may be maintained against a Local "Board of Health."

It is true that that decision is, to some extent, inconsistent with *Arthy* v. *Coleman*[10] (which, incidentally, was not referred to, although Lord Campbell had sat in the court in *Arthy* v. *Coleman*[10]), because the judgment in the *Southampton* case[11] does not proceed upon the basis that you must read after the word "bonâ fide" the words "and without negligence"; but they are reading the section as if it were a section absolving members of local authorities from personal liability. At any rate, whatever the true construction of section 265, both the cases to which I have referred are authority for saying that persons referred to (including the local authority itself)—and here the hospital management committee—can be sued in negligence.

I do not know that it is for me to endeavour to interpret section 265 of the Act of 1875, but it does seem to me that the true view may well be that one must read, after "bona fide," the words "and without negligence." I think that section 265 is really a section which must be linked up with section 308, the compensation section, and that the effect of those two sections is that where an act is done in pursuance of the statutory powers and is done bona fide and, I would add, without negligence, then no person whose property, for instance, may be injured or damaged can bring suit but must depend upon the compensation to be awarded under the provisions of the later section. It is sufficient for me in this case to say that I am not satisfied that section 72 of the National Health Service Act, applying, as it does, section 265 of the Act of 1875, absolves the defendants from liability.

I should add that I was referred to a Scottish case, *Davis* v. *Board of Management for Glasgow Victoria Hospital*,[12] which, although not binding on me, is a very persuasive authority. It is to be observed there that Lord Strachan was driven to the conclusion, very reluctantly, on the statutes relating to Scotland, that the management committee of a hospital, despite the equivalent in Scotland to section 13 of the English National Health Service

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[9] 8 E. & B. 801, 813.

[10] 30 L.T.(o.s.) 101.

[11] 8 E. & B. 801.

[12] 1950 S.C. 382.

1953

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Parker J.

Act—which, incidentally, is also section 13 of the Scottish Act—could not be sued. I have looked at that case with some care, and I think it is sufficient for me to say that the wording of the Public Health (Scotland) Act of 1897 (which was the relevant statute there) was somewhat different; but, quite apart from that, I feel unable to follow the decision in that case.

Finally, I should mention that section 72 of the National Health Service Act of 1946, in applying section 265 of the Public Health Act of 1875, recites in brackets these words: "which "relates to the protection of members and officers of certain "authorities," and Mr. Hoare, quite rightly, I think, contends that a recital in an Act of Parliament is not conclusive. I mention that only because it is, perhaps, significant that in the equivalent legislation in Scotland, the National Health Service (Scotland) Act, 1947, in incorporating the section of the Public Health (Scotland) Act, recites the latter Act in these terms: "which relates "to the protection of local authorities and their officers," clearly a very significant change of words. I do not, however, think that I can produce any argument on that, and I do not seek to do so.

For these reasons I decide this issue in favour of the plaintiff.

Judgment for the plaintiff.
Leave to appeal was granted.

Solicitors: *Frank Simmonds, Parker & Hammond, for Percy Holt & Nowers, Croydon; Cunliffe & Airy; Hempsons.*

P. B. D.

1953
Feb. 10, 11.

Parker J.

WEBSTER *v.* GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION LD.

Insurance—Motor-vehicle—"Loss"—Fraudulent possession of car by agent of owner—Sale by agent in own name—Police inform owner recovery unlikely—No further steps by owner to recover car—Whether a "loss" within meaning of policy.

Condition—Written notice of occurrence—Insurer's acquiescence in informal discussion—Waiver.

The claimant owned a motor-car which was insured by the respondents under a comprehensive policy indemnifying him against loss of the car. By condition 1 of the policy: "The policy holder shall "give notice in writing . . . as soon as possible after the occurrence "of any . . . loss . . . with full particulars. . . ." In February, 1952, the claimant was induced to part with possession of the car to T. on T.'s fraudulent representation that he had a buyer for it. In fact, T. never had a buyer but sold the car by auction in his own name, and misappropriated the proceeds. The claimant approached the police but, having been advised by them that any attempt to recover the car would be unavailing, took no further steps in the matter, although he knew in whose hands the car was. In May the claimant's solicitor explained orally to the respondents' claims manager what had occurred and made it clear that he was making a claim that there had been a loss within the policy; the claims manager, without intimating that a written claim would be required, said that he would report the matter. The respondents disputed the claim and the matter was referred to an arbitrator, before whom the respondents took the further point that the claimant was in breach of condition 1 of the policy. The arbitrator held that there had been a loss of the car within the meaning of the policy, and, finding that the respondents had led the claimant to believe that a formal compliance with condition 1 would be unnecessary, also held that they had waived the condition. On a case stated by the arbitrator:—

Held, (1) that this was not a case of the loss of the proceeds of sale of a car but, prima facie, of the car itself, at latest when it was sent for sale by auction in T.'s name; that in such circumstances, although an assured was not entitled to sit by and do nothing, it was never necessary for him to prove that in all circumstances a chattel was irrecoverable; but that the test whether there was a loss was whether recovery of the chattel was still uncertain after all reasonable steps to recover it had been taken by the assured; and that, applying that test, there was a loss of the car in the present case;

(2) that the arbitrator had found that the respondents, whether intentionally or not, had induced the claimant to act in a particular way in reliance on their conduct, and that therefore it could not be said that the arbitrator was wrong in law in holding that the respondents had waived condition 1 of the policy. The claimant, accordingly, was entitled to succeed in his claim under the policy.

London and Provincial Leather Processes Ld. v. *Hudson* [1939] 2 K.B. 724; 55 T.L.R. 1047; [1939] 3 All E.R. 857, and *Moore* v. *Evans* [1917] 1 K.B. 458; 33 T.L.R. 125, considered.

SPECIAL CASE stated by an arbitrator, Mr. Stephen Chapman.

The following facts material to this report were found by the arbitrator:—The claimant, Frank Webster, was the owner of a Standard motor-car, in respect of which he was the holder of a "General" comprehensive insurance policy (individual owners), No. M.V. 1833459, issued by the respondents, the General Accident Fire and Life Assurance Corporation Ld., operative until midnight of August 3, 1952. By the policy it was provided that ". . . subject to the terms exceptions and conditions contained "herein . . . —Section 1. Loss of or damage to the insured "motor-car. The corporation will indemnify the policy holder "against loss of . . . any motor-car described in the schedule "hereto. . . . Conditions (1) The policy holder shall give notice "in writing to the head office of the corporation as soon as possible "after the occurrence of any accident and/or loss and/or damage "with full particulars thereof. . . . (5) The policy holder shall "take all reasonable steps to safeguard from loss or damage . . . "any motor-car described in the schedule hereto. . . . (9) The "due observance and fulfilment of the terms provisions and "endorsements of this policy in so far as they relate to anything "to be done or complied with by the policy holder . . . shall be "conditions precedent to the liability of the corporation to make "any payment under this policy." The policy also contained an arbitration clause in the usual form.

On December 20, 1951, one Taylor formed a limited company registered under the Companies Act, 1948, under the name Didcot Motor Auctions Ld., of which he was the sole operative and effective representative. In the name of that company Taylor caused to be inserted in the Oxford Times the following advertisement: "Motor Auctions held at Calcot . . . next date Tuesday, "February 26, at 2.0 p.m. . . . entries taken on site—Auctioneer "H. Rexworthy Trimnell. . . ." Trimnell was in fact a licensed auctioneer whose principal business was to act at motor-car auctions at Shepton Mallet, Somerset, and who had agreed to act at auctions for Taylor and his company, but he was not the auctioneer who conducted the sale on February 26, 1952.

Having seen that advertisement the claimant entered his car for the sale at the auction at Calcot at a reserve price of £325. The bidding did not reach that price, and the claimant was about to collect his car and leave when Taylor said to him: "Don't go, "I have got a private bid for your car." At the end of the auction, Taylor told him that he had got someone who had offered to buy his car privately for £335, and the claimant went away, leaving his car behind on the understanding that it would be sold as soon as Taylor had communicated to the prospective buyer the acceptance of that offer.

In fact it was untrue that Taylor had a private bid or buyer for the car, and the arbitrator found that his conduct from the moment when, the car not having reached its reserve price at the auction, the claimant prepared to collect it and drive it away was fraudulent, and that from that moment, having made up his mind that he was going to get the car into his control so that he could turn it to his own benefit, he deliberately set out to swindle the claimant out of his car.

On successive dates Taylor delivered cheques for varying amounts in purported payment for the car, all of which were dishonoured, and finally on April 10, 1952, his last cheque was returned to the claimant by the bank marked " account closed." Meanwhile, Taylor sent the claimant's car, with two others, to Shepton Mallet to be sold by Trimnell at his auction there. The entry form, dated March 3 and authorizing a sale at £290 to vendor, was made out in Taylor's name and certified that the car was his property. On March 6, 1952, the car was sold by auction by Trimnell to one Allis for £285, and subsequently came into the hands of one Fry. On March 7, a cheque in payment for the claimant's and the two other cars was sent by Trimnell to Taylor, who paid it into his own private account.

On three occasions after the return of the cheque on April 10, the claimant saw the police about his position and was advised that it was hopeless for him to try to recover the car if it had been left with a motor dealer, and on May 1, 1952, he received advice from his solicitor to a similar effect. In the upshot the claimant made no attempt to recover his car either from Allis or from Fry.

On May 19, 1952, the claimant's solicitor saw the respondents' metropolitan claims manager at their London office and told him the story so far as he knew it, and made it clear that he was making a claim that there had been a loss within the meaning of the policy. At the conclusion of the interview the claims manager told the claimant's solicitor that he would report to his head office, without intimating that the solicitor was acting irregularly or asking for a written form of claim. On July 28, 1952, a formal claim was submitted on one of the respondents' claim forms. Under the heading " Description of occurrence " it was stated " Fully explained (*a*) to London general manager " (*b*) to company's solicitor . . ." The " results of the accident " were stated to be " loss of vehicle by conspiracy or fraudulent " trick."

The claimant claimed that a loss within the meaning of the policy had occurred during its currency. The respondents disputed the claim and the matter was referred to the arbitrator. The respondents took the further point that the claimant was in breach of condition 1 of the policy in that no written notice had been given in accordance with that condition. The claimant contended that the respondents, in the circumstances, must be taken to have waived that condition.

The arbitrator held that possession of the car had not been obtained by means of larceny by a trick or larceny as a bailee, but that Taylor, by his false pretences as to the existence of a private buyer, caused the claimant to continue to accord to his company the possession of the car, and that the essence of the matter was that the claimant was swindled out of his car in the sense that he would never have parted with it but for the fraudulent inducements held out to him by Taylor. In his opinion the claimant was deprived of his car on February 26, 1952, and there was then uncertainty as to his ever recovering it sufficient to constitute a loss as at that date, alternatively, there was such an uncertainty on March 3, and alternatively, on March 6, and any dissipation of the uncertainty thereafter could not undo a loss which had already matured. He found that a segregation of the company from Taylor was unreal and that even if the consent to the company's possession of the car was extracted by fraud, it was a sufficient consent, having regard to the decisions in *Pearson* v. *Rose and Young Ld.*[1] and *Du Jardin* v. *Beadman Bros.*,[2] for the purposes of the Factors Act, 1889, to give the purchaser a good title, and, therefore, it was not unreasonable for the claimant to refrain from claiming the car from the person ascertained to be in possession of it. The arbitrator further found that the notice of July 28, 1952, could not be regarded as a notice giving full particulars of the loss such as was required by the policy but that, in all the circumstances, the respondents, by acquiescing in informal discussions, lulled the claimant's solicitor into thinking that that method was all right, and had waived the requirement as to writing and, therefore, had not established any breach by the claimant of the conditions of the policy.

The questions, inter alia, for the decision of the court were whether, on those facts, (1) the claimant sustained a loss of his motor-car within the meaning of the policy, and (3) the arbitrator was entitled in point of law to hold that no breach of the conditions of the policy was established against the claimant. [Question 2 was not material to this report.] In the event of the answers to the questions being "Yes" the arbitrator awarded that the claimant was entitled to be indemnified by the respondents to the extent of the value of his car.

[1] [1951] 1 K.B. 275; 66 T.L.R. (Pt. 2) 886; [1950] 2 All E.R. 1027.

[2] [1952] 2 Q.B. 712; [1951] 1 T.L.R. 1601; [1952] 2 All E.R. 160.

During the hearing, it was agreed between the parties that the third question should be treated as relating to a holding that a waiver by the respondents of the condition of the policy had been established.

Beney Q.C. and *John Thompson* for the respondent insurers. "Loss" in the policy prima facie means de facto loss and not mere impairment or deprivation of title. Where there has been a voluntary parting with a chattel and something happens to it afterwards, albeit through fraud or breach of contract, there cannot be said to be a loss. There is a distinction between the case where a chattel is handed over to a bailee and control is retained in the sense that the right to recover it is reserved by the owner, and while it is in the bailee's care it is burned or destroyed or so removed from the bailee's custody that the owner cannot get it back, and the case where the owner, in handing the chattel over to another person, intends to part with it for good and all; in the first case the owner intended to recover the chattel and there would be a disappearance or deprivation against his will amounting to a loss; in the second case there would not be a loss because the owner intended to part with it. Loss requires a disappearance from the physical possession of the owner or a bailee, either by accident or by design, against the owner's will. Here the owner intended Taylor to sell the car. In the *Lake* v. *Simmons* [3] type of case, and where there is larceny by a trick or larceny by a bailee, the voluntary nature of the owner's act is negatived and there is a loss; here the arbitrator found that control of the car was obtained by false pretences but the test he applied as to whether there had been a loss was too wide and too vague.

[PARKER J. There can be loss of property without loss of title.]

There must be some permanent deprivation other than by the owner's voluntary act. The real loss to the claimant was the loss of the proceeds of sale. He might have a cause of action against Taylor for breach of contract or negligence, and he undoubtably has a right of action against Taylor or the company for fraud, but he cannot say "I have lost my car." The claimant knew where the car was; he has not proved that he cannot recover it. The case must be looked at in the light of all the facts; all that happened was that the claimant was by the fraud of Taylor deprived of the benefit of a transaction of the same nature as that into which he intended to enter. *Moore* v. *Evans* [4] and *Holmes* v. *Payne* [5] apply to wholly different circumstances.

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[3] [1926] 2 K.B. 51; 42 T.L.R. 425; [1927] A.C. 487; 43 T.L.R. 417.

The policy is a commercial document. It cannot be assumed that the word "loss," used as it is in conjunction with the word "damages," was intended to cover the fraudulent activities of third persons, or the assured's possible dealings with third persons. What is meant is loss in the ordinarily accepted sense.

The arbitrator found that the notice of July 28 was not a sufficient compliance with condition 1 of the policy; it is submitted that he was wrong in holding that the onus in that issue rests on the insurers. The onus of proving the breach of the condition rests on the insurers, but the onus of proving that the breach was waived rests on the claimant. Waiver requires full knowledge and something other than silence; there was no representation by word or conduct on the part of the insurers that no notice of claim under condition 1 would be required.

Colin Duncan and *B. T. Neill* for the claimant. The vital factor in this case is that there never was a purchaser who had made a bid for the car; that is a finding of fact by the arbitrator which is conclusive; if he did find that there had been an obtaining or retaining of possession by Taylor by false pretences, that is a finding of law open to review by the court. [*Nello Simone* v. *A/S M/S Straum* [6] referred to.] The court could hold that there had been larceny by a trick or larceny by a bailee, but it is submitted that the nature of the offence committed by Taylor was immaterial. The crucial moment in point of time is the moment when the claimant was on the point of driving his car home after it had failed to reach the reserve price, and the important circumstances are those in which Taylor retained possession of the car.

[PARKER J. The position is exactly the same as if he had retaken possession and had got the car to the exit on the road and had then been stopped by Taylor and brought the car back.]

The circumstances in which Taylor sold the car are completely different from those which he represented to the claimant and those in which the claimant authorized, or could be deemed to authorize, the sale. If the disappearance must be against the will of the owner it is difficult to imagine a clearer case of a chattel being dealt with against the owner's will than this. A loss cannot be defined in the abstract and the question is what in all the circumstances can fairly be said to be a loss.

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[4] [1918] A.C. 185; 34 T.L.R. 51.

[5] [1930] 2 K.B. 301; 46 T.L.R. 413.

[6] (1949) 83 Ll.L.Rep. 157.

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There cannot be a loss because a chattel has been temporarily mislaid, but loss is not confined to the case where a chattel is shown to be completely irrecoverable: see the remarks of Roche J. in *Holmes* v. *Payne.*[7] Where it is shown that there has been a deprivation fulfilling the general description of loss, and it is further shown that the circumstances are such that recovery is at least improbable, that amounts to a loss.

[PARKER J. To say that there is a deprivation in circumstances making recovery uncertain is not enough; it seems to me that it should be in circumstances making recovery uncertain after all reasonable steps to recover have been taken.]

There is a finding that the claimant did everything that he could reasonably be expected to do; there is a further finding that the sale was by mercantile agents within the meaning of the Factors Act, 1889, and that the claimant could not have recovered the car. *Heap* v. *Motorists' Advisory Agency Ld.*,[8] where *Folkes* v. *King* [9] was distinguished, and *London and Provincial Leather Processes Ld.* v. *Hudson* [10] are relied on. The remarks of Lord Goddard in the latter case are intended to be of general application and they extend the earlier accepted definition of loss. If the arbitrator was right in saying that the claimant was swindled out of his car, he cannot be said to have been swindled out of the money due to him from a bid that never existed.

Unless the facts found by the arbitrator are incapable of constituting a waiver, his finding is conclusive. The remarks in MacGillivray on Insurance Law, 3rd ed., pp. 985–6, are adopted; in *American Accident* v. *Carol* [11] there was a condition which does not exist in this case. The principle stated by Kennedy J. in *Toronto Railway Co.* v. *National British and Irish Millers' Insurance Co.*,[12] cited and applied by Avory J. in *Burridge & Son* v. *F. H. Haines & Sons Ld.*,[13] is relied upon.

Beney Q.C. in reply. The general observations in *Burridge & Son* v. *F. H. Haines & Sons Ld.*[13] are far too wide to be of any assistance in this case.

Unless it can be shown that the acts of an agent contrary to the authority given him by his principal amount to a conversion, *London and Provincial Leather Processes Ld.* v. *Hudson* [14] does not apply. In that case there was a conversion, certainly by the sub-contractors. The arbitrator has not found that there was a conversion in this case, and there is no question here of larceny by a trick or larceny by a bailee: see *Whitehorn Brothers* v. *Davison.*[15]

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[7] [1930] 2 K.B. 301.

[8] [1923] 1 K.B. 577; 39 T.L.R. 150.

[9] [1923] 1 K.B. 282; 39 T.L.R. 77.

[10] [1939] 2 K.B. 724; 55 T.L.R. 1047; [1939] 3 All E.R. 857.

[11] (1896) 13 Ohio C.C. 154.

[12] (1914) 111 L.T. 555.

[13] (1918) 87 L.J.K.B. 641; 118 L.T. 681.

[14] [1939] 2 K.B. 724.

Parker J. stated the facts substantially as set out above and continued: The arbitrator held, so far as it is material on the first question, that it was untrue that Taylor had a private bid or a private buyer for the car at £335, or at any price. He stated in his award: "I am forced to the conclusion that from the "moment I have indicated [immediately after the auction at "Calcot on February 26, 1952] Taylor had made up his mind that "he was going to get the claimant's car into his control so that "he could turn it to his own benefit without paying for it."

He then considered what, if any, offence had been committed in connexion with the obtaining of possession of this car, and found that there had been no larceny by a trick, or larceny as a bailee, but that: "The true position from the point of view "of criminal law seems to me to be that Taylor, by his false "pretences as to the existence of a private buyer, caused the "claimant to continue to accord to the company the possession "of the car instead of exercising his immediate right to resume "possession on the car not being sold at the auction. After considering such authorities as there are, it seems to me that "'loss' can be fairly defined as 'an effective deprivation in "'circumstances making recovery uncertain.'" Having referred to *Holmes* v. *Payne*[1] and *Moore* v. *Evans*,[2] he continued: "On the other hand, there can, I conceive, be an effective "deprivation, even where the chattel itself physically exists, if "the title to it has been impaired or if uncertainty exists as to "whether the title remains unimpaired. Approaching the matter "on the basis of this test, the facts have to be considered closely. "On my interpretation of them, Taylor had formed the "fraudulent intention of getting his hands on the claimant's car, "turning it into cash and putting the proceeds into his own "pocket." After describing how that was done, he continued: "In ordinary, everyday parlance that seems to me to be a loss to "the claimant in the sense I have suggested it; it was not "merely that Taylor fraudulently deprived the claimant of the "proceeds of sale of a car he had undertaken, by his company,

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[15] [1911] 1 K.B. 463.

[1] [1930] 2 K.B. 301; 46 T.L.R. 413.

[2] [1917] 1 K.B. 458; [1918] A.C. 185; 34 T.L.R. 51.

" to sell on his behalf; the essence of the matter was that the " claimant was, as I have said, swindled out of his car in the " sense that he would never have parted with his car but for the " fraudulent inducements held out to him by Taylor. The " claimant was deprived of his car on February 26, 1952, and, " judging by the knowledge we now have of the intention under- " lying the deprivation, I should for my part regard it as reason- " ably clear that it was there and then uncertain whether he " would ever be able to recover it." Having considered the chances of recovery, he said: " Accordingly, in my view, it was " not unreasonable . . . for the claimant to refrain from claiming " the car from the person ascertained to be in possession."

Mr. Beney, for the respondents, has criticized the attempted definition by the arbitrator to which I have referred, and particularly the passage where he says, " I conceive there can be an " effective deprivation even where the chattel itself physically " exists if the title to it has been impaired or if uncertainty exists " as to whether the title remains unimpaired." He argued that to constitute a loss there must be a de facto loss and not an impairment of title. He drew a distinction between cases where the chattel was taken against the will of the owner, whether from himself or from a bailee holding it on his behalf, and cases where an owner voluntarily handed the chattel over to another, albeit as a result of that other's fraudulent misrepresentation, and contended that only in the former case would there be a " loss " under the policy.

It is almost impossible to lay down any accurate test which will fit all circumstances. Indeed, in *Holmes* v. *Payne* [3] Roche J. said, " It would be as unwise, as it is unnecessary, that I should " attempt a definition of the word ' loss ' under a policy such as " this." The policy in that case was similar to the one now under consideration. Some help is, I think, to be obtained from a passage, to which Roche J. referred, from the judgment of Bankes L.J. in *Moore* v. *Evans*,[4] where Bankes L.J. said [5]: " Mere temporary " deprivation would not under ordinary circumstances constitute " a loss. On the other hand complete deprivation amounting to a " certainty that the goods could never be recovered is not neces- " sary to constitute a loss. It is between these two extremes that " the difficult cases lie, and no assistance can be derived from " putting cases which are clearly on the one side or the other

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[3] [1930] 2 K.B. 301, 310.
[4] [1917] 1 K.B. 458.
[5] [1917] 1 K.B. 458, 471.

"of the dividing line between the two. If assistance is to be "obtained at all from considering a hypothetical case it can only "be done by taking one which raises somewhat similar considera-"tions to the case which we have to decide."

I find myself unable to accept the test suggested by Mr. Beney. I agree that where a chattel is handed over voluntarily by the owner to another it may make it difficult for the owner thereafter to prove a loss; it may also be that, in such a case, what is lost is not the chattel, but the proceeds if the chattel was handed over for sale. No one would suggest that, if the owner of a chattel handed over the chattel to X for sale, X having honestly represented that he had a buyer, and the chattel was duly sold, but X misappropriated the proceeds, there would have been a loss of the chattel. The loss there would be of the proceeds of sale. On the other hand, if a chattel is handed over to an agent, whether or not as a result of a fraudulent misrepresentation, and the agent then proceeds to deal with the chattel in a way which amounts to a conversion of the chattel, there may be a loss. In that connexion I rely upon the judgment of Goddard L.J. in *London and Provincial Leather Processes Ld.* v. *Hudson.*[6] That was a case in which the plaintiffs, an English company, the owners of skins, sent them to a firm in Germany to be processed; the company voluntarily parted with possession of the chattels but there was no question of fraudulent representation. The German firm kept some of the goods to process themselves and sub-contracted the rest out to sub-contractors. The German firm got into difficulties and the sub-contractors claimed, wrongfully, to retain the chattels of the English company, as against money owing to them by the German firm. Clearly the sub-contractors had no lien on the goods and in German law that was a delict. When asked for them, they refused to hand them over, claiming them under a lien—undoubtedly a tort both in German and in English law. The German firm became bankrupt, and the administrator wrongfully sold the plaintiffs' goods and refused to account either for the goods or for the money. Goddard L.J. said[7]: "Here we have "the fact that the plaintiffs have been at any rate deprived of "their goods. They have suffered a loss in the sense that they "cannot get their goods. Why can they not? With regard to "the Moebis and Dieter [sub-contractor] goods it seems to me "that it is clear. Moebis and Dieter converted these goods. I

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[6] [1939] 2 K.B. 724.

[7] [1939] 2 K.B. 724, 731, 732.

" do not know what the expression is in German law, but I " should expect it might be said that they committed a delict " towards the goods. They committed the wrong or tort which, " in English law, we should call conversion, because, having a " demand made upon them to deliver up the goods, they refused " to do so and have asserted a right to retain the goods which " was bad in law, a right which they were not entitled to enforce " against the goods. Therefore that was a conversion. For my " part I am unable to see why, if goods which are insured " against all risks are converted so that the true owner, the " assured, is deprived of the possession of the goods, he is any " less entitled to recover under the policy than he would be if " the goods were stolen. He is deprived of the possession in one " case by theft; he is deprived in circumstances which would " render the spoliator liable to the criminal law. It is a matter " of the state of mind, whether there was a felonious intent. In " the case of conversion he is equally deprived of his goods and " equally wrongfully deprived, but wrongfully only in the sense " that a civil tort is committed and not a criminal wrong."

I find it unnecessary to go in detail into the facts as found here to decide whether the offence of larceny by a trick or larceny by a bailee was committed, or whether possession of the goods by Taylor's company was retained as a result of fraudulent representation. The arbitrator has found the latter. Even on that view, it seems to me that there was prima facie a loss, at the latest when this motor-car was sent to Shepton Mallet in Taylor's name. I think that it is conceded that if on the facts the offence of larceny by a trick or larceny by a bailee was established, then there would, prima facie, be a loss.

An additional point is, however, made that even if what happened could constitute a loss, there is, on the facts, no loss proved, because the claimant at all times knew where the chattel was, and that he has not shown that it was irrecoverable. In this connexion it is important to bear in mind that we are dealing here with a non-marine policy and no questions of constructive total loss or of such principles of marine insurance applying. At the same time it is clear from the passage that I have read from the judgment of Bankes L.J. in *Moore* v. *Evans* [8] that it is never necessary for a claimant to prove that in all circumstances the chattel is irrecoverable. Every case depends upon its own facts.

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[8] [1917] 1 K.B. 458, 471.

An assured is not entitled to sit by and do nothing. Equally, he is not bound to launch into legal proceedings or if necessary carry them to the House of Lords. The test, as it seems to me, is whether, after all reasonable steps to recover a chattel have been taken by the assured, recovery is uncertain.

In the present case one of the things which strike me forcibly is that after the cheque had finally been returned "Account "closed" the claimant not unnaturally tried to get the assistance of the police. The arbitrator found that: "The subsequent facts, "so far as the first issue is concerned, are that on three "occasions after the return of the third cheque the claimant saw "the police at three different police stations about his position "and received the advice that it was hopeless for him to try and "recover the car if it had been left with a motor dealer." Having received that advice, and no doubt partly because of that advice, and partly from the result of legal advice which he received, the claimant has in fact taken no steps to recover his car. So far as the legal considerations are concerned, it is not unlikely, and in fact the arbitrator as I understand it is satisfied, that the sale at any rate to Allis was made by the company as a mercantile agent, in which case Allis, and probably Fry, got a perfectly good title to the motor-car. Be that as it may, I am satisfied that in all the circumstances the claimant took all reasonable steps—or, putting it the other way, did not fail to do anything which a reasonable man should have done, and that recovery, to say the least, of the motor-car was uncertain. In those circumstances, I am satisfied that there was a loss within the meaning of this policy.

[His Lordship stated the facts relevant to the alleged waiver and continued:] The question for me is: Are the facts as found capable in law of amounting to a waiver? That depends on the conduct of the respondents—and it is perhaps to be observed that no representative of the respondents gave evidence—and on whether in fact the claimant or his representative was lulled to sleep, as the arbitrator puts it, or was induced to act in a particular way in reliance on what the respondents had done. I have a finding that he did. It matters not whether the respondents intended to waive it. They may have intended not to waive it. If they led the claimant, however unintentionally, to think that it was unnecessary for him to comply formally with condition 1, then that would amount to a waiver. On the facts found by the arbitrator, I am unable to say that he came to a wrong decision in point of law. Accordingly, this award must be answered by saying "Yes" to the first question and to the third question. In those circumstances, the award is upheld.

Judgment for claimant.

Solicitors: *Dennes & Co.; Reynolds, Gorst & Porter.*

J. F. L.

REGINA *v.* MISKIN LOWER, GLAMORGANSHIRE JUSTICES. *Ex parte* YOUNG.

1953
Jan. 20, 21;
Feb. 6.

Lord Goddard C.J., Croom-Johnson and Pearson JJ.

Husband and Wife—Justices—Maintenance—Arrears—Committal order—Suspended on conditions—Non-compliance—Accrual of further arrears—Payment of original arrears—Husband entitled to discharge of committal order—No implication of appropriation of sums paid to current payments of maintenance—Appropriation to original arrears—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 9—*Bastardy Laws Amendment Act,* 1872 (35 *&* 36 *Vict. c.* 65), *s.* 4—*Summary Jurisdiction Act,* 1848 (11 *&* 12 *Vict. c.* 43), *ss.* 28, 35—*Summary Jurisdiction Act,* 1879 (42 *&* 43 *Vict. c.* 49), *ss.* 5, 21 (1), 54—*Criminal Justice Administration Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 58), *ss.* 3 (1), 32 (3).

A husband was £7 12s. 6d. in arrears under a maintenance order requiring him to pay £2 10s. a week to his wife. Justices made a committal order in respect of the arrears, suspended on condition that he paid the sums provided for in the maintenance order and in addition 2s. a week in respect of the arrears. The husband made three payments of £2 each and, on being arrested, a further payment of £1 12s. 6d.; he was then released on the footing that he had paid the original debt in full. No other payments having been made, the wife applied to the justices to implement the terms of the suspended committal order; and the justices refused. On the ground that the payments should have been appropriated to current payments of maintenance and that the justices were wrong in refusing her application, the wife applied for an order of mandamus directed to the justices and requiring them to exercise their discretion under section 9 of the Summary Jurisdiction (Married Women) Act, 1895, and section 8 of the Money Payments (Justices Procedure) Act, 1935, and in particular to consider committing the husband to prison for non-payment of arrears under the maintenance order:—

Held, first, that the committal order remained throughout the sanction for non-payment of the original debt, and the postponement on condition that the husband regularly paid the amounts of the weekly payments plus an addition on account of the arrears which constituted the original debt merely gave him a beneficial option and did not deprive him of the right, which could not be taken away, to secure a discharge of or a release from the committal order by payment of the original debt. The husband was therefore entitled to secure a discharge or a release from the committal order by paying the original debt, notwithstanding that he had not complied with the conditions on which it was suspended and further arrears had accrued.

Held, secondly, that the question whether the payments made by the husband should be appropriated to the original debt depended on the particular facts of the case. The husband would be likely to wish the payments to be utilized in discharge of the original debt, and there was no evidence of any express appropriation of any of the sums paid to current weekly payments, nor were there any grounds for implying such appropriation. The husband was, therefore, entitled to have the payments appropriated to the discharge of the original debt, and was accordingly rightly considered to have paid it. The application failed.

Observations on the desirability of all appeals relating to matters under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1949, being brought to the Probate, Divorce and Admiralty Division.

Ruther v. *Ruther* [1903] 2 K.B. 270 questioned.

Application for order of mandamus.

The following statement of facts is taken from the judgment of Pearson J. A maintenance order was made by justices on May 16, 1951, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, and the material provisions of the order were that (1) the legal custody of a child of the marriage between the applicant and her husband, the defendant, be committed to the applicant; (2) the defendant do pay to the collecting officer on behalf of the applicant the weekly sum of £2, together with the additional sum of 10s. for the maintenance of the child, the first of such payments to be made on Wednesday, May 25, 1951, and the subsequent payments on every Wednesday in each succeeding week; and (3) the defendant do pay the sum of £2 12s. 6d. for the costs of the court and of the applicant incurred in obtaining the order.

On July 12, 1951, the applicant caused to be issued a summons in respect of arrears under the maintenance order amounting to £7 12s. 6d., and on August 1, 1951, the justices made an order committing the defendant to prison for one month, such order to be suspended so long as the defendant paid the weekly sum of £2 10s. 0d. provided for in the maintenance order, and in addition 2s. per week on account of arrears. The sum for non-payment of which the committal order was made was the above-mentioned sum of £7 12s. 6d. In each of the next two weeks the defendant paid to the collecting officer the sum of £2 only, so that the condition on which the committal order was suspended was not complied with, but a total of £4 was paid. On August 18, 1951, the applicant applied for a warrant to commit the defendant. A warrant of commitment was issued for the balance of £3 12s. 6d. on the footing that £4 of the original debt of £7 12s. 6d. had already been paid. While the warrant was in the hands of the police the defendant made a further payment of £2, and, on being arrested, a further payment of £1 12s. 6d., and the defendant was released on the footing that he had by that time paid the full amount of the original debt.

From November 22, 1951, to January 8, 1952, there was correspondence between the applicant's solicitor and the clerk to the justices. The clerk to the justices, in a letter of January 4, 1952, referred to the sums of £4, £2 and £1 12s. 6d. paid by the defendant, and said that the defendant had paid the amount for which he was summoned, that the commitment could not be issued again, and that the applicant should apply for a further summons for arrears, then amounting to £20 13s. 6d., with a view to the defendant again being brought to the court to be dealt with. In reply to that letter the applicant's solicitor wrote on January 5, 1952: "Re *Young* v. *Young*. I thank you for "your letter of yesterday's date, the contents of which I note. "I regret that I cannot agree with your contention. The sum of "£4 paid by the defendant by August 18 was in respect of the "current order and not the arrears. The arrears were not "reduced at all, and in fact increased by the sum of 10s. per "week. The warrant, therefore, should have been issued for "£7 12s. 6d., the full amount of the arrears, of which the "defendant has now paid only the sum of £3 12s 6d. If your "contention was correct a defendant could escape the conse-"quences of the committal entirely by merely paying the current "order and could say that any sum paid was on account of arrears. "It is my contention that the weekly payments made must be "set off firstly against the current order and it is only any "balance which can be set off against the arrears."

The clerk to the justices wrote on January 8, 1952: "*Young* "v. *Young*. I am obliged for your letter of the 5th instant. The "legal position as to the appropriation of payments made to the

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REGINA v. MISKIN LOWER, GLAMORGANSHIRE JUSTICES. *Ex parte* YOUNG.

" collecting officer after the committal order has been made and " suspended so long as certain fixed payments are made is not " free from doubt. There has been a great deal of correspondence " in the Justice of the Peace and Local Government Review on " this question during the past 12 months. Opinions have been " expressed by some of the correspondents that, unless a special " direction is given by the sender, a collecting officer is bound to " appropriate the whole of such payment to that part of the total " amount due which first accrued, namely, the arrears. In your " client's case that course was followed, with the result that the " total amount of arrears due in respect of the commitment was " paid. I therefore regret that I can do nothing to assist your " client, but suggest that she issues a further summons for the " arrears now due under the order, which amount to £20 13s. 6d."

The applicant moved for an order of mandamus directed to the justices and requiring them to exercise the discretion conferred on them by section 9 of the Summary Jurisdiction (Married Women) Act, 1895, and by section 8 of the Money Payments (Justices Procedure) Act, 1935, and in particular to consider committing the defendant to prison for non-payment of arrears under the maintenance order. The grounds of the application were that, the applicant having applied orally to the justices to implement the terms of the suspended committal order and to commit the defendant to prison, such application was refused by the justices by letter dated November 23, 1952, and that their refusal so to do was wrong.

David Pennant for the applicant referred to *Devaynes* v. *Noble* (*Clayton's* case)[1]; *Leeson* v. *Leeson*.[2]

Elwyn Jones for the respondents.

Cur. adv. vult.

February 6. LORD GODDARD C.J. Pearson J. will deliver the first judgment.

PEARSON J. This case arises out of a maintenance order made by the court of summary jurisdiction for the petty sessional division of Miskin Lower, in the county of Glamorgan, and a suspended committal order made by the same court on the ground of non-payment of arrears under the maintenance order.

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[1] (1816) 1 Mer. 572.

[2] [1936] 2 K.B. 156.

[His Lordship stated the facts as set out above and continued:] Two questions arise, namely (a) whether the defendant was entitled to secure a discharge of or release from the committal order by paying the original debt of £7 12s. 6d. notwithstanding that he had not complied with the conditions on which the committal order was suspended and further arrears had accrued, and (b) whether the defendant was rightly considered to have paid the original debt by making the payments of £2, £2, £2 and £1 12s. 6d. mentioned above.

For the purpose of determining the first question it will be necessary to consider the relevant statutory provisions. Section 9 of the Summary Jurisdiction (Married Women) Act, 1895, provides: "The payment of any sum of money directed to be paid " by any order under this Act may be enforced in the same " manner as the payment of money is enforced under an order " of affiliation." The maintenance order in this case was made under that Act as amended or extended by the Married Women (Maintenance) Act, 1920, and the Married Women (Maintenance) Act, 1949.

The main provisions for enforcement of the payment of money under an order of affiliation are contained in section 4 of the Bastardy Laws Amendment Act, 1872, and with later amendments are as follows: ". . . and if at any time after the " expiration of 14 clear days from the making of such order " as aforesaid it be made to appear to any one justice, upon " oath or affirmation, that any sum to be paid in pursuance of " such order has not been paid, such justice may, by warrant " under his hand and seal, cause such putative father to be " brought before any two justices, and in case such putative " father neglect or refuse to make payment of the sums due " from him under such order, or since any commitment for " disobedience to such order as hereinafter provided, together " with the costs attending such warrant, apprehension, and " bringing up of such putative father, such two justices may, " by warrant under their hands and seals, direct the sum so " appearing to be due, together with such costs, to be recovered " by distress and sale of the goods and chattels of such putative " father, . . . but if upon the return of such warrant, or if by " the admission of such putative father, it appear that no " sufficient distress can be had, then any such two justices may, " if they see fit, by warrant under their hands and seals, cause " such putative father to be committed to the common gaol or "house of correction . . . there to remain, without bail or mainprize, for any term not exceeding three calendar months unless such sum and costs, and all reasonable charges attending the said distress, together with the costs and charges attending the commitment and conveying to gaol or to the house of correction, and of the persons employed to convey him thither, be sooner paid and satisfied."

Section 1 of the Affiliation Orders Act, 1914, provides for the appointment of collecting officers and prescribes their duties. Section 54 of the Summary Jurisdiction Act, 1879, provides: "This Act shall apply to the levying of sums adjudged to be paid by an order in any matter of bastardy, or by an order which is enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums, in like manner as if an order in any such matter or so enforceable were a conviction on information. . . . This Act shall be construed as one with the Summary Jurisdiction Act, 1848, so far as is consistent with the tenour of such Acts respectively, and save as aforesaid shall be subject to the exceptions specified in section 35 of the Summary Jurisdiction Act, 1848."

Section 35 of the Summary Jurisdiction Act, 1848, provides: ". . . nor shall anything in this Act extend or be construed to extend to any complaints, orders, or warrants in matters of bastardy made against the putative father of any bastard child, save and except such of the provisions aforesaid as relate to . . . the levying of sums ordered to be paid, or to the imprisonment of a defendant for non-payment of the same."

Section 28 of the Summary Jurisdiction Act, 1848, provides: ". . . and in all cases in which any person shall be imprisoned as aforesaid for non-payment of any penalty or other sum he may pay or cause to be paid to the keeper of the prison in which he shall be so imprisoned the sum in the warrant of commitment mentioned, together with the amount of the costs, charges, and expences (if any) therein also mentioned, and the said keeper shall receive the same, and shall thereupon discharge such person, if he be in his custody for no other matter."

Section 21 (1) of the Summary Jurisdiction Act, 1879, provides: "A court of summary jurisdiction to whom application is made, either to issue a warrant of distress for any sum adjudged to be paid by a conviction or order, or to issue a warrant for committing a person to prison for non-payment of a sum of money adjudged to be paid by a conviction, or in the "case of a sum not a civil debt by an order, or for default of "sufficient distress to satisfy any such sum, may, if the court "deem it expedient so to do, postpone the issue of such warrant "until such time and on such conditions, if any, as to the court "may seem just."

The Criminal Justice Administration Act, 1914, s. 3 (1), as amended by section 79 and the Ninth Schedule to the Criminal Justice Act, 1948, provides: "(1) Where a term of imprisonment is imposed by a court of summary jurisdiction in respect "of the non-payment of any sum of money . . . that term shall, "on payment of a part of such sum to any person authorized to "receive it, be reduced by such number of days as bears to the "total number of days in the term less one day the proportion "most nearly approximating to, without exceeding, the proportion which the part paid bears to the sum in respect of which "the imprisonment is imposed. (2) Provision may be made by "rules under section 29 of the Summary Jurisdiction Act, 1879, "as to the application of sums paid under this section and for "determining the persons authorized to receive such payments "and the conditions under which such payments may be made."

The relevant rules are the Summary Jurisdiction Rules, 1915 (S.R. & O., 1915, No. 200), rules 18–25 as amended by S.R. & O., 1933, No. 1120.

Section 32 (3) of the same Act (the Criminal Justice Administration Act, 1914) provides: "Where in any proceedings for the "enforcement of an order in any matter of bastardy or of an order "enforceable as an order of affiliation the court commits the defendant to prison then, unless the court otherwise directs, no arrears "shall accrue under the order during the time that the defendant "is in prison." Moreover, the imprisonment discharges the defendant from liability for the arrears for which he was imprisoned. (Halsbury's Laws of England, Hailsham edition, Vol. 21, p. 650, note (*o*); Lushington's Law of Affiliation and Bastardy, 7th ed., p. 64, note (*h*); *Robson* v. *Spearman*.[1])

Section 5 of the Summary Jurisdiction Act, 1879, provides a scale of maximum terms of imprisonment for non-payment of money, the maximum terms being proportioned to the amounts unpaid.

In my opinion, it appears from these provisions that (subject to possible additions in respect of costs, which do not in principle affect the present question) (1) the committal order is the sanction for non-payment of what may conveniently be called "the original debt," being the specific sum which is mentioned in the application for the committal order and proved to the justices to be in arrear; (2) if there were a distress warrant, it would be for the levying of the amount of the original debt; (3) a committal order cannot be made if the original debt has already been paid by the time when the application for the committal order is made to the justices; (4) even after the defendant has been committed to prison, he can secure his release by payment of the original debt, and he can secure a proportionate reduction of the term of imprisonment by payment of part of the original debt; (5) the maximum term of imprisonment depends on the amount of the sum for non-payment of which it is imposed; and (6) where a committal order is "suspended" on conditions, as in this case, there is a postponement of the issue of the committal order only so long as certain conditions are complied with, and there is no enlargement of the scope of the committal order.

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[1] (1820) 3 B. & Ald. 493.

In my opinion, the committal order remains throughout the sanction for non-payment of the original debt, and the postponement of the issue of the committal order on condition that the defendant regularly pays the amounts of the weekly payments plus some addition on account of the arrears which constitute the original debt merely gives to the defendant a beneficial option and does not deprive him of the right to secure a discharge of or release from the committal order by payment of the original debt. The option is beneficial to the defendant, because, if he exercises the option, no further arrears accrue and he gradually pays off the original debt for which the committal order is the sanction, so that the committal order remains suspended and eventually is discharged or ceases to have effect. If he does not exercise the option and fails to keep up the current payments, he is liable to further proceedings and a new committal order in respect of the new arrears, but the existing committal order retains its original character as the sanction for the original debt and is not converted into a sanction for the growing total of the original debt plus the accumulating new arrears. If the existing committal order, which is for a short term of imprisonment related to the small amount of the original debt, were converted into the sanction for the growing total, he could "work off" by imprisonment for a short term a large amount of old and new arrears for which a longer term of imprisonment would be appropriate.

In my opinion, the answer to the first question is that the defendant was entitled to secure a discharge of or release from the committal order by paying the original debt of £7 12s. 6d. notwithstanding that he had not complied with the conditions on which the committal order was suspended and further arrears had accrued.

The second question is whether the defendant was rightly considered to have paid the original debt of £7 12s. 6d. by making the payments of £2, £2, £2 and £1 12s. 6d. mentioned above. The answer to that question must depend on the facts of the particular case. In this case the defendant did make those payments and they did amount to £7 12s. 6d. He would be likely to wish these payments to be utilized in discharge of the original debt so that he would secure his release from the committal order. He was obviously not exercising his option to comply with the conditions of suspension, because he was not paying £2 12s. 0d. per week regularly or at all. Nor was he paying regularly or at all the amounts of the current weekly payments due under the maintenance order at the rate of £2 10s. 0d. per week. There was no evidence of any express appropriation of any of the sums paid to the current weekly payments, and there are no grounds for implying any such appropriation. So far as appears from the evidence, the first two sums paid were not appropriated, except that by payment to the collecting officer they were appropriated generally to the indebtedness of the defendant to his wife under the orders of the court. The third payment probably was and the last payment, made to avoid arrest, certainly was appropriated to discharging the balance of the original debt. In those circumstances, I am of opinion that the defendant was entitled to appropriate or have appropriated all these sums to the discharge of the original debt and he was rightly considered to have paid the original debt.

Accordingly, in my opinion, this application fails and should be dismissed.

CROOM-JOHNSON J. [read by Pearson J.]. I agree that the defendant husband was entitled to secure a discharge from his liability to be committed to prison by paying the amount of the arrears, £7 12s. 6d., outstanding at the time when the committal order was made. I agree that the justices were empowered by section 21 of the Summary Jurisdiction Act, 1879, if they thought it expedient so to do, to postpone the issue of the warrant on such conditions, if any, as to them might seem just, but I can find no power in them in so doing to deprive the defendant of his right to pay off the arrears and so avoid committal and preserve his liberty, and they did not purport to do so. The question whether the defendant was rightly considered to have paid the arrears of £7 12s. 6d. is, in my opinion, a question of fact. The defendant was not bound to take advantage of the terms upon which the justices suspended the committal order and he was obviously not doing so. I agree with Pearson J., whose judgment I have had the advantage of reading in advance, that there was no evidence of any express appropriation by the defendant of any of the sums paid to the weekly amounts continuing to accrue under the maintenance order, and I know of no right in the collecting officer to make any such appropriation. On the figures, the last payment of £1 12s. 6d. must have been intended by the defendant to discharge the balance of the £7 12s. 6d.; it can refer to nothing else and is not, I think, a mere arithmetical coincidence. On the facts of this case, I have come to the conclusion that the defendant was rightly considered to have paid off all the arrears of £7 12s. 6d., and I agree that the application for mandamus should be dismissed.

LORD GODDARD C.J. I agree with the judgment of Pearson J., and, in view of the importance of this matter, I will shortly state my opinion.

At first sight it would seem that if justices suspend the operation of a committal order on certain terms, with which the person affected thereby does not comply, the order ought to take effect and a warrant should issue, but a person can only be committed for arrears, and those must be arrears which had accrued when application for committal was made. If, then, he is ordered to pay off arrears at so much a week and to keep up the payments under the original maintenance order, and if he pays a sum which wipes out the arrears, if he were then sent to prison it would follow that he was being committed for arrears accruing since the date of the order. I think, therefore, that the justices were right in refusing to issue a warrant, but they could have made a fresh order in respect of the arrears which had accrued since the date of the committal order, and this they offered to do.

In my opinion, the matter does not depend on the law relating to appropriation of payments, but solely on the statutory provisions relating to the power to commit and to the defendant's right to avoid committal by paying off the arrears. This latter right cannot be taken away. If the justices had powers similar to those conferred by rule 6 of the recent Matrimonial Causes (Judgment Summons) Rules (S.I. 1952, No. 2209), the present difficulty and seeming anomaly would not arise, but these rules cannot without legislation be applied to orders of courts of summary jurisdiction. The proceedings in this case took the form of an application for mandamus, but I have no doubt that the matter could be raised by way of special case, and I think that it would be most desirable if all appeals under the Summary Jurisdiction Acts relating to separation and maintenance were brought to the Probate, Divorce and Admiralty Division. In *Ruther* v. *Ruther* [2] it was held that a special case arising out of an application to commit for arrears lay to this Division and not to the Probate, Divorce and Admiralty Division, but, if I may say so, the reasons given do not appear to be wholly satisfactory, and evidently the Divisional court of the Probate, Divorce and Admiralty Division which heard *Adams* v. *Adams* [3] did not regard the decision with favour. If the practice could be changed by rule or by an order of the Lord Chancellor under section 57 of the Judicature (Consolidation) Act, 1925, it would, I think, be a desirable alteration.

I agree that this application fails and should be dismissed.

Application dismissed.

Solicitors: *Rhys Roberts & Co. for Graeme Kemp, Cardiff; Theodore Goddard & Co. for Morgan, Bruce & Nicholas, Pontypridd.*

J. F. L.

[2] [1903] 2 K.B. 270.

[3] [1914] P. 155.

NICOLENE LD. *v.* SIMMONDS.

[1951 N. No. 1962.]

C. A.
1953
March 5.
Singleton, Denning and Hodson L.JJ.

Contract—Formation—Consensus ad idem—Meaningless term—Whether contract concluded—Sale of goods—Agreement subject to "the usual "conditions of acceptance."

A contract for the sale of a quantity of reinforcing steel bars was expressed to be subject to "the usual conditions of acceptance." The seller having repudiated the contract, the buyers claimed, and were awarded by the trial judge, damages for breach of contract. On appeal, the seller contended that the contract was not concluded, there being no consensus ad idem in regard to the usual conditions of acceptance:—

Held, that there being no "usual conditions of acceptance" the condition was meaningless and therefore could be ignored, and that the contract was complete and enforceable.

Per Denning L.J. A distinction must be drawn between a clause which is meaningless and a clause which is yet to be agreed. A clause which is meaningless can often be ignored, whilst still leaving the contract good; whereas a clause which has yet to be agreed may mean that there is no contract at all, because the parties have not agreed on all the essential terms.

British Electrical and Associated Industries (Cardiff) Ld. v. *Patley Pressings Ld.* [1953] 1 W.L.R. 280; [1953] 1 All E.R. 94 considered.

Appeal from Sellers J.

The action was brought by the plaintiffs, Nicolene Ld., against the defendant, H. B. Simmonds, for damages for breach of contract. The contract was said to be contained in the following three letters. The first, from the plaintiffs to the defendant, and dated August 10, 1951, contained the following passage: "We "enclose our detailed order and require your written confirmation "of acceptance of the order." The detailed order referred to 3,000 tons of Thomas quality reinforcing steel bars of West German origin, in mixed sizes of 6/30 millimetres at £45 14s. 5d. per ton of 1,016 kilos, which the plaintiffs offered to buy from the defendant. On August 16 the defendant, writing from his private address, sent the following reply to the plaintiffs: "I "thank you for your letter and order of August 10 for 3,000 tons "of Thomas quality reinforcing bars of West German origin in "mixed sizes of 6/30 mm. at £45 14s. 5d. per ton of 1,016 kilos. "As you have made the order direct to me, I am unable to "confirm on my usual printed form which would have the usual "force majeure and war clauses, but I assume that we are in "agreement that the usual conditions of acceptance apply. I "am pleased to inform you that my suppliers state they are "certain they will be able to ship at least 25 p.c. of the order "before the end of the month and might even be able to ship "considerably more. . . . I thank you very much indeed for "entrusting this contract to me and assure you I will give the "matter my personal attention. . . ." The bars were intended to be shipped to Pakistan. On August 29 the plaintiffs' managing director wrote to the defendant: "Re 3,000 long tons reinforcing "bars, Karachi. We confirm that we have instructed United "Marine (1939) Ld. . . . who are our forwarding agents, to arrange "for shipping space. . . . I am now awaiting receiving a pro "forma invoice . . . also your instructions regarding in whose "favour the credit is to be opened. . . ."

The defendant failed to make deliveries under the contract, and the plaintiffs claimed damages for breach of contract. The claim came before Sellers J., who on November 12, 1952, awarded the plaintiffs £6,900 damages.

The defendant appealed, contending that, there being no consensus ad idem in regard to the conditions mentioned in his letter of August 16, there was not a concluded contract.

Diplock Q.C. and *M. Leitman* for the defendant. There are two questions of law to be determined: (1) was there a concluded contract between the parties; (2) if so, what were its terms. The defendant submits that there was no contract, because there was no consensus ad idem. The function of the court in cases of this character is to interpret the intention of the parties as expressed in the words which they use. It is no part of the court's function to make a contract for the parties if, on the true construction of the words used, it cannot spell out a consensus ad idem. The court may, in interpreting the words used, imply terms either from usage of the trade or from previous business of the parties, but if in construing the expressions used by the parties it comes to the conclusion that there was no consensus ad idem, or that an essential term of the contract has never been agreed, or has been left over for future agreement, then it must hold that there is no concluded contract.

If it is found that the parties have failed to express their intentions in intelligible words, there is no contract, and the court is not entitled to say it will ignore those words because no precise meaning can be attached to them. Here we have an a fortiori case. In *Bishop & Baxter Ld.* v. *Anglo-Eastern Trading and Industrial Co. Ld.*,[1] where an order from buyers was "subject to "war clause," it was held that there was no evidence that the parties had any particular form of clause in mind, and there was no consensus ad idem, and therefore not a concluded contract.

[DENNING L.J. The fact that the parties have put in a term which has no meaning does not mean that there is no contract. The term remains, although it is meaningless.]

In *In re Vince; Ex parte Baxter* [2] it was held that if a term is so ambiguous as to be unintelligible the parties are not ad idem and the agreement is void.

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[1] [1944] K.B. 12; 60 T.L.R. 37; [1943] 2 All E.R. 598.

[2] [1892] 2 Q.B. 478.

[SINGLETON L.J. There was a loan and the money was due, but the term relating to the payment of interest was unintelligible.]

In *British Electrical and Associated Industries (Cardiff) Ld.* v. *Patley Pressings Ld.*[3] McNair J. held that a contract "subject "to force majeure conditions" was unintelligible, ambiguous and uncertain. So also in *G. Scammell & Nephew Ld.* v. *Ouston*[4] a contract stipulated that part of the price was to be "on hire-"purchase terms." It was held to be too vague to constitute a concluded contract.

In the present case the term is "usual conditions of accept-"ance." The court must be able to say what are the usual conditions of acceptance and to what matters those conditions related. No evidence has been given of the existence of such conditions, and it is submitted that this contract comes within the decision in *Bishop & Baxter Ld.* v. *Anglo-Eastern Trading and Industrial Co. Ld.*[5] and the appeal should be allowed.

S. H. Noakes, for the plaintiffs, was not called upon for argument.

SINGLETON L.J. [having stated the facts]: On the appeal only one question has been raised, and that really arises on the plea in paragraph 1 of the defence: "The defendant admits the letters "referred to in paragraph 1 of the statement of claim but denies "that the same constituted a concluded contract between the "plaintiffs and the defendant." We have had authorities cited to us to help us to form a view on the question whether or not, on the documents in this case, it can be said that there was a concluded contract between the parties. I do not propose to refer to them at length. The position is covered by a judgment of McNair J. in *British Electrical and Associated Industries (Cardiff) Ld.* v. *Patley Pressings Ld.*[1] In that case: "The terms of a contract "note in relation to a sale of steel contained the following clause: "'Subject to force majeure conditions that the government "'restricts the export of the material at the time of delivery.' "There was a variety of force majeure conditions in the trade, "and no evidence that any particular ones had been agreed on. "The buyers relied on that note as evidencing a contract"; and it was held by McNair J.: "(1) . . . Because the words of the force

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[3] [1953] 1 W.L.R. 280; [1953] 1 All E.R. 94.

[4] [1941] A.C. 251.

[5] [1944] K.B. 12.

[1] [1953] 1 W.L.R. 280, 283; [1953] 1 All E.R. 94.

"majeure clause in the note were too obscure to be capable of "any definite or precise meaning; and (2) because 'conditions' "in the phrase 'force majeure conditions' meant 'clauses' or "'stipulations' and not 'contingencies' or 'circumstances,' "and that, it not being agreed which conditions applied, "there was no consensus ad idem, and therefore no completed "contract. . . ."

The judge in that case cited some words of Lord Maugham and of Lord Wright in *G. Scammell & Nephew Ld.* v. *Ouston.*[2] The words of Lord Maugham were[3]: "In order to constitute a "valid contract the parties must so express themselves that "their meaning can be determined with a reasonable degree of "certainty"; and Lord Wright said[4] that the first ground on which the court ought to hold on the facts of that case that there was no contract was "that the language used was so "obscure and so incapable of any definite or precise meaning "that the court is unable to attribute to the parties any particular "contractual intention."

Mr. Diplock submitted to this court that applying those words, we ought, on the documents in this case, to hold that the parties had not entered into a contract; that there was no concluded contract between the parties; and, again, taking a later passage from the judgment of McNair J., he drew our attention to the fact that, even though the parties thought and acted on the basis that a contract existed between them, no consensus ad idem would be held to exist where there still remained to be negotiated and agreed the exact form of a clause or of conditions. I have referred to the judgment of McNair J. because in it the judge considered the authorities over a considerable period; but the case which was before McNair J. was quite different from the one with which we have to deal.

I come now to the three, or, perhaps, four, documents which fall to be considered, namely, the three letters and the order attached to the first of those letters.

[His Lordship read the letters of August 10 and 16 and continued:] It is submitted by Mr. Diplock that the defendant's letter of August 16 was not an acceptance of the offer made by the plaintiffs' letter of August 10; that it was at the most a qualified acceptance because of the paragraph: "As you have made the "order direct to me, I am unable to confirm on my usual printed

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[2] [1941] A.C. 251; 57 T.L.R. 280; [1941] 1 All E.R. 14.

[3] [1941] A.C. 251, 255.

[4] Ibid. 268.

"form which would have the usual force majeure and war clauses, "but I assume that we are in agreement that the usual conditions "of acceptance apply." I regard that letter as an acceptance of the offer; I do not think that it ought to be treated as a qualified acceptance. It was in fact accepted by the action of the parties later, and, it may be said, by the letter of August 29 from the plaintiffs.

On August 29 the plaintiffs wrote to the defendant: "Re "3,000 long tons reinforcing bars, Karachi. We confirm that "we have instructed United Marine (1939) Ld., 64 Queen "Street, London, E.C.4, who are our forwarding agents, to "arrange for shipping space to take the 3,000 tons"—they had given instructions for that to be done—"and have asked you to "get into direct communication with the director of the United "Marine who is looking after the business, who is Mr. Peachey, "in order that they get into direct communication with your "German steel mills in accordance with your instructions. I "am now awaiting receiving a pro forma invoice covering the "3,000 tons from you or from your steel mills which should give "all the details which were embodied in my order to you. I "am also awaiting your instructions regarding in whose favour "the credit is to be opened and confirmation from you as to with "what bank the 3 per cent. performance bond is being opened in "our favour and the full wording of the performance bond which "should cover not only a guarantee of delivery, but also the "sizes will be equally divided. The markings are as follows." Then follow details of the lettering and the numbering which were to be put on the cases marking the goods which had to go to Karachi. That letter is signed by Mr. Felix, the managing director of Nicolene Ld., the plaintiff company.

It is to be observed that there is not a word said in that letter of August 29 about the paragraph in the letter of August 16 to which I have referred as the important paragraph, and it may well be that Mr. Felix, acting for the plaintiff company, did not think that that particular paragraph called for any answer. It seems to me that what the defendant said in that paragraph was: "I am contracting with you direct; I am "unable to confirm on my usual printed form." He had not a usual printed form. He was referring, we are told, to a form used by some company in which he is the guiding spirit. What he is saying is: "I am not using that form; that form does not "come into the contract; I am unable to confirm on my usual

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"printed form which would have the usual force majeure and "war clauses; in other words, they do not come into this "contract." He adds: "but I assume that we are in agree-"ment that the usual conditions of acceptance apply." The plaintiffs, in answering, say nothing with regard to that. There is a contract, and the defendant assumes, and the plaintiffs are content to assume, that the usual conditions of acceptance apply, whatever they are.

Mr. Diplock submitted that those very words assumed that there was something to be settled between the plaintiffs and the defendant before there could be a contract. Sellers J. thought that there ought to be implied into the contract a force majeure and war clause of a kind determined rather by the conditions which the defendant used on his company's paper. I do not think that that is right, but I have reached the same conclusion as Sellers J. by another mode of approach. In my view, the document of August 16 was an acceptance of the contract; that it was treated as such by the plaintiffs is clear. That does not matter; but it was in fact an acceptance of a contract, both parties assuming that the usual conditions of acceptance applied.

"The usual conditions of acceptance are to apply." Those words may be thought by some to refer to the conditions as to the quality of the goods—an implied condition that they shall be reasonably fit for the purpose for which they are required; an implied condition that they shall be of merchantable quality; conditions arising from section 14 of the Sale of Goods Act, 1893. For all I know the defendant may have intended that; in which case, they were unnecessary. The words "I assume that we are "in agreement that the usual conditions of acceptance apply" are, to my mind, meaningless, and words which are meaningless can be ignored.

Mr. Diplock submitted further that we must give a meaning to all the words in the documents. If parties write letters, which are sometimes long, it is not always easy to give a meaning to all that one or other writes. This defendant was the managing director of a company, or the head of a company—I do not know what his position was—which was called the Defiant Cycle Co. Ld., and, according to his evidence, he intended to bring in the conditions of acceptance, or some of them, which he attaches, or his company attaches, to a contract into which they enter. A document before us shows the Defiant Cycle Co. Ld.'s form of confirmation of order: "We thank you "for your esteemed instructions and have pleasure in confirming "your order in accordance with the particulars set out here-"under and subject to the conditions shown overleaf." The conditions shown overleaf are in extremely small print, so small that some considerate solicitor thought it right to let us have a typed copy of them to enable us to read them. It is not important from the point of view of this case, but I find it difficult to think that anyone considering entering into a contract with the Defiant Cycle Co. Ld. would agree to be bound by such conditions (if he read them). There are such terms and conditions as I never remember having seen before, but that is the concern of the Defiant Cycle Co. Ld., and the conditions form no part of this case.

The paragraph to which importance is attached—"As you "have made the order direct to me, I am unable to confirm on "my usual printed form which would have the usual force "majeure and war clauses, but I assume that we are in agree-"ment that the usual conditions of acceptance apply"—seems to me to mean just nothing. The defendant was writing, as some people like to write, using important terms about force majeure and war clauses. He may, or may not, have known what they meant, but he put in this paragraph in order to appear as though he understood these things; he did not intend, nor did anyone else intend, that force majeure and war clauses would apply. That is the way in which I think this paragraph ought to be regarded.

In my view, this appeal fails. There was a contract between the parties; that contract was broken by the defendant, and the judge was right in ordering the defendant to pay damages in respect of his breach of contract.

DENNING L.J. This case raises a short, but important, point which can be stated quite simply: the plaintiffs allege that there was a contract for the sale to them of 3,000 tons of steel reinforcing bars, and the seller broke his contract. When the buyers claimed damages the seller set up the defence that, owing to one of the sentences in the letters which constituted the contract, there was no contract at all. The material words are: "We are in agreement that the usual conditions of acceptance "apply." There were no usual conditions of acceptance at all, so the words are meaningless. There is nothing to which they can apply. On that account it is said that there was never a contract at all between the parties. In my opinion a distinction must be drawn between a clause which is meaningless and a clause which is yet to be agreed. A clause which is meaningless can often be ignored, whilst still leaving the contract good; whereas a clause which has yet to be agreed may mean that there is no contract at all, because the parties have not agreed on all the essential terms.

I take it to be clear law that if one of the parties to a contract inserts into it an exempting condition in his own favour, which the other side agrees, and it afterwards turns out that that condition is meaningless, or what comes to the same thing, that it is so ambiguous that no ascertainable meaning can be given to it, that does not mean that the whole contract is a nullity. It only means that the exempting condition is a nullity and must be rejected. It would be strange indeed if a party could escape from every one of his obligations by inserting a meaningless exception from some of them. The proposition which I have stated is supported by the numerous cases where it has been held that if a man signs a contract expressly as agent for a named company, and it turns out that there is no such company in existence, because it has not yet been formed, the courts do not say there is no contract; they reject the meaningless words "as agent for the company" and hold that the man himself was a party to the contract. So, also, if he signs "as agent" and has no principal, the words "as agent" are rejected and the contract held to be a good contract between the parties.

The case of *In re Vince; Ex parte Baxter*,[5] as I read it, is an authority in support of what I have said. The contract of loan itself was good, but the vague and unintelligible clause was rejected. The other cases which were relied on are all to be explained on the ground that there was a clause yet to be agreed. In *Love & Stewart Ld.* v. *S. Instone & Co. Ld.*,[6] where there was a strike clause yet to be agreed, Lord Sumner said that the case was "one of continuing negotiations broken off in medio." In *G. Scammell & Nephew Ld.* v. *Ouston*,[7] where there were hire-purchase terms yet to be agreed, Lord Wright said "their "agreement was inchoate and never got beyond negotiations." In *Bishop & Baxter Ld.* v. *Anglo-Eastern Trading and Industrial*

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[5] [1892] 2 Q.B. 478.

[6] (1917) 33 T.L.R. 475, 477.

[7] [1941] A.C. 251, 269; 57 T.L.R. 280; [1941] 1 All E.R. 14.

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Co. Ld.,[8] where there was a war clause yet to be agreed, this court said: "Until the parties . . . agreed on a particular form "and content of a war clause, there . . . could be no consensus "ad idem." As I read all those cases, they were cases where there was a clause yet to be agreed, the matter was still in negotiation, and there was no concluded contract.

I would just say a word about the recent decision of McNair J. in *British Electrical and Associated Industries (Cardiff) Ld.* v. *Patley Pressings Ld.*,[9] where the contract note contained the clause "subject to force majeure conditions." If the true construction of the documents in that case was that an essential term had yet to be agreed, it would fall within the cases to which I have referred, but if the true view was that the exempting clause was agreed but was "so vague and uncertain "as to be incapable of any precise meaning" (which was how McNair J. described it) I should have thought that it could be ignored without impairing the validity of the contract. It was clearly severable from the rest of the contract, whereas the term in *G. Scammell & Nephew Ld.* v. *Ouston* [10] was not.

In the present case there was nothing yet to be agreed. There was nothing left to further negotiation. All that happened was that the parties agreed that "the usual conditions of "acceptance apply." That clause was so vague and uncertain as to be incapable of any precise meaning. It is clearly severable from the rest of the contract. It can be rejected without impairing the sense or reasonableness of the contract as a whole, and it should be so rejected. The contract should be held good and the clause ignored. The parties themselves treated the contract as subsisting. They regarded it as creating binding obligations between them; and it would be most unfortunate if the law should say otherwise. You would find defaulters all scanning their contracts to find some meaningless clause on which to ride free.

Sellers J. interpreted the sentence in the letter somewhat differently. He thought it meant that "the usual force majeure "and war clauses apply." Even so, the clause is still meaningless, because there are no such usual clauses. It is not a case where the clauses had yet to be agreed. There was nothing left to further negotiation. On this interpretation, therefore, the same position is reached. The sentence is meaningless and must be ignored, but the contract, nevertheless, remains good.[11]

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[8] [1944] K.B. 12, 14; 60 T.L.R. 37; [1943] 2 All E.R. 598.

[9] [1953] 1 W.L.R. 280, 283.

[10] [1941] A.C. 251.

I agree that the appeal should be dismissed.

HODSON L.J. I also agree. It has been contended by the defendant that this is one of those cases in which the parties have left open for future agreement a term in a contract, so that there is no contract, a term having been left open on the true construction of the letter of August 16. I am of opinion that that letter contains an unqualified acceptance by the defendant of the offer and does not contain a qualified acceptance amounting to a counter-offer. It is unnecessary for me to add anything further to what my Lords have said on this subject, or to re-read the passage. It is true, as Mr. Diplock points out, that the language used in the paragraph is, if not a qualification of an acceptance, meaningless. I do not accept the proposition that because some meaningless words are used in a letter which contains an unqualified acceptance of an offer, that those meaningless words must be relied on by the acceptor as enabling him to obtain a judgment in his favour on the basis that there has been no acceptance at all.

I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Lucien Fior; Gouldens.*

A. W. G.

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[11] Cf. *Guthing* v. *Lynn* (1831) 2 B. & Ad. 232

ISLE OF WIGHT COUNTY COUNCIL *v.* WARWICKSHIRE COUNTY COUNCIL.

1953
Feb. 6.

Lord Goddard C.J., Lynskey and Pearson JJ.

Children and Young Persons—Approved school order—Local authority named as that of offender's residence—Appeal—Variation of order by quarter sessions—No power to substitute name of local authority in whose area offence was committed—Lacuna in the Act—Boy two nights in place before stealing yacht — Residence — Children and Young Persons Act, 1933 (23 & 24 *Geo.* 5, *c.* 12), *ss.* 70 (1) (2), 90 (2) (3), 102 (1).

By section 70 (2) of the Children and Young Persons Act, 1933, every approved school order made by a juvenile court "shall name "the local authority within whose district the child or young

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

"person" named in the order "was resident, or if that is not "known, the local authority . . . within whose district the offence "was committed." By section 90 (1) the authority named in the order is made liable to make a contribution towards the cost of maintenance of the person named in the order, but by section 90 (2) that authority may, if it contends that the child or young person named in the order is resident in the district of some other authority, appeal to a court of summary jurisdiction to vary the order, and the court may substitute the name of that other authority. By section 90 (3) any person aggrieved by a decision of the court of summary jurisdiction may appeal to quarter sessions.

A boy aged 16 was convicted of larceny by a juvenile court at Ryde, Isle of Wight, and committed to an approved school. The committal order named the Warwickshire County Council as the local authority within whose district he was resident. On appeal by the Warwickshire County Council a court of summary jurisdiction in the Isle of Wight held that the boy was resident in the Isle of Wight and varied the order accordingly. From that decision the Isle of Wight County Council appealed to quarter sessions, who found that the boy was resident neither in the Isle of Wight nor Warwickshire nor anywhere for the purposes of section 70 (2). They dismissed the appeal, but varied the order made by the juvenile court, and named the Isle of Wight County Council not as the local authority within whose area the boy was resident, but as the local authority in whose area the offence was committed:—

Held, that when proceedings are taken under section 90 (2) and (3) of the Act, the court has no power to substitute for the local authority named in the order the name of the local authority in whose area the offence was committed. Unless the court can substitute for the name of the local authority named in the order the name of another local authority in whose area the person to whom the order relates has been proved to be resident, which is the only power given to the court, the order made by the juvenile court must stand.

Stoke-on-Trent Borough Council v. *Cheshire County Council* [1915] 3 K.B. 699 considered.

The failure of section 90 to give a court of summary jurisdiction or quarter sessions power to insert into an approved school order, where proceedings are taken under that section, the name of the local authority in whose district the offence was committed, was a lacuna to which it was desirable that the attention of the appropriate authority—the Home Office—should be drawn with a view to amending legislation.

Case stated by the Appeal Committee for the Isle of Wight Quarter Sessions.

At the hearing before the appeal committee the following facts were proved or admitted: Allan White was born on June 25, 1935. His parents were separated, his father being in lodgings at Bretford, near Rugby, Warwickshire, his mother's last-known address being a holiday camp at Skegness. In August, 1948, the boy's mother sent him to his grandmother, who was living at Dunchurch, near Rugby. The grandmother was unable to care for the boy, and as his father refused to have him to live with him, he was cared for in children's homes and the Warwickshire County Council was responsible for his maintenance. He finally left school in July, 1950.

On September 5, 1950, he joined the Royal Navy and was posted to a shore training school near Ipswich, Suffolk, where he remained until he was discharged from the service on August 14, 1951. On his discharge, in accordance with usual practice, he was provided with a railway ticket to Rugby, via London, Rugby being the place of residence of his father who had been recorded as his next of kin. Instead of going to Rugby, the boy went to Southampton, intending to join the Merchant Navy. At Southampton he was unable to find a recruiting office. He boarded the steamer bound for the Isle of Wight, thinking that he might find work there. He took a single ticket to Cowes, arriving there on August 15. He stayed until August 17, sleeping for two nights in the open, and on August 17 he took a sailing dinghy and sailed down Spithead, intending to sail out to sea. Instead, he put in at Bembridge, where he boarded the yacht *Cedora* primarily to obtain food. On August 18 he cast off and sailed out to sea, not intending to return to the Isle of Wight. On August 19 the yacht was intercepted by a motor torpedo boat 20 miles off Dieppe and the boy was brought back to England. On September 17, 1951, he was found guilty of the larceny of the yacht and was committed to an approved school.

The juvenile court, being of the opinion that the boy was resident in Warwickshire, inserted the name of the Warwickshire County Council into the approved school order in accordance with the provisions of section 70 of the Act and that authority became liable to contribute towards his maintenance. The Warwickshire County Council thereupon appealed to a court of summary jurisdiction under section 90 (2) of the Act and that court substituted the name of the Isle of Wight County Council, holding that the boy had been resident within the Isle of Wight at the time that he committed the offence. Being aggrieved by this decision the Isle of Wight County Council appealed to quarter sessions as provided by section 90 (3) of the Act. The appeal committee found on the evidence that the boy was not resident either in the Isle of Wight or in Warwickshire and were of the opinion that for the purposes of section 70 of the Act he was not resident anywhere. They held, however, that they were entitled to vary the order made by the juvenile court by substituting for the name of the Warwickshire County Council named therein the name of the Isle of Wight County Council as the local authority within whose district the boy committed the offence, his residence at the material date being unknown. They accordingly so varied the order and dismissed the appeal of the Isle of Wight County Council, but stated this case.

The Isle of Wight County Council appealed.

N. Brodrick for the appellants, the Isle of Wight County Council. A local authority which disputes the residence of a child or young person who is the subject of an approved school order has to prove that he is resident within the area of some other local authority. It is not sufficient for the purposes of the Act to prove that the child or young person is not resident within the area of the authority named in the order. The powers of the court of summary jurisdiction to vary an order made by a juvenile court under section 90 (2) of the Act are limited. The court can only substitute another local authority for the authority named in the order if that other authority can be named as the authority within whose area the child or young person actually resides. Quarter sessions, in hearing an appeal by a local authority which is aggrieved by a decision of a court of summary jurisdiction under section 90 (3) has no greater power to vary the order made by the juvenile court than has the court of summary jurisdiction. Therefore a local authority which bases its appeal on the fact that the child or young person is not resident within its area cannot use the procedure provided by section 90.

For the purpose of the Act the child or young person's residence is his home at the time the approved school order is made: see *South Shields Corporation* v. *Liverpool Corporation.*[1] Section 74 (3) of the Children Act, 1908, included a proviso that a youthful offender should be presumed to reside in the place where the offence had been committed unless it was proved that he resided in some other place. That Act was repealed and the proviso does not appear in any similar form in the Children and Young Persons Act, 1933, which is a consolidating Act. The legislature has shifted the burden of proof to the local authority which seeks to substitute the name of another local authority in the approved school order.

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[1] [1943] K.B. 264; [1943] 1 All E.R. 338.

The respondents may have had a right of appeal under section 102 of the Act as the person liable to contribute towards the young person's maintenance, but no notice was served on them as provided by section 35 (1) (*b*) of the Act and that section does not say what is to happen when notification is not in fact given.

[Lord Goddard C.J. Section 102 seems to give a right of appeal to a person who is before the court when the order is made, but I doubt whether that section applies to this case as it refers to "a person required to contribute." Section 90 (2) seems to be a provision giving special rights to local authorities. Is a local authority a person required to contribute?]

If a local authority wishes to contend that the child or young person is resident within the area of another local authority or is resident outside England it must proceed under the provisions of section 90. With regard to section 102 of the Act the local authority named in the order is required to make contributions towards the expenses of the managers of the school to which the child or young person is sent.

When a local authority has taken advantage of the procedure laid down by section 90 (2) and has appealed against the order of the juvenile court to a court of summary jurisdiction, any person aggrieved by the decision of that court may appeal to quarter sessions under section 90 (3). The powers of quarter sessions must be limited to hearing appeals against decisions made by the court of summary jurisdiction under section 90 (2). If this is not so, the words of the subsection would be quite pointless. Quarter sessions appears to have treated the appeal made by the Isle of Wight County Council as an appeal against the order made by the juvenile court. In fact it was an appeal made against the variation of the juvenile court order by the court of summary jurisdiction. The burden of proving that the child or young person to whom the order relates resides in some other area than that of the local authority named in the order lies with the local authority asking for the substitution. The respondents, the Warwickshire County Council, failed to prove to the satisfaction of quarter sessions that the boy resided in the Isle of Wight. The Isle of Wight County Council's appeal should therefore have been allowed and the order made by the juvenile court restored. That was the meaning of the Act. In naming the Isle of Wight County Council in the order as the local authority in whose area the offence was committed quarter sessions exceeded their jurisdiction.

A. P. Marshall Q.C. and *M. G. Polson* for the respondents, the Warwickshire County Council. Section 74 (7) of the Children Act, 1908, contained a corresponding provision to section 90 of the Children and Young Persons Act, 1933, but in the earlier Act the liability of a local authority to contribute to the maintenance of a child or young person to whom an approved school order related was based solely on residence. By the wording of section 74 (3) residence could be arrived at through a fiction. Section 90 of the Act of 1933 sought to re-enact the provisions of section 74 of the Act of 1908 which was repealed, but the legislature appears to have overlooked the fiction of residence raised in the corresponding section of the Act of 1908. Section 90 of the present Act is not happily worded, but it ought to be construed to give effect to the obvious intention of the legislature to give a right of appeal to a local authority wrongly named in the approved school order. That must import the right for the local authority to say that the child or young person to whom the order relates is not resident within its area, but within the area of some other local authority which need not be identified.

[Lord Goddard C.J. That would mean writing words into the section.]

The Warwickshire County Council had a right to argue that the boy was not resident within its own district. Where a local authority can show that a child or young person to whom an approved school order relates does not reside within its district that local authority ought not to be made liable to contribute towards his maintenance. Warwickshire County Council's appeal against the juvenile court order was based on the contention that the boy was resident in the Isle of Wight. This contention was upheld by the court of summary jurisdiction which exercised its powers to vary the order. Quarter sessions were wrong in finding that the boy was not resident in the Isle of Wight. Lord Reading C.J. said, in *Stoke-on-Trent Borough Council* v. *Cheshire County Council*,[2] that residence for the purposes of section 74 of the Children Act, 1908 (which was the Act then in force), was where a youthful offender lived, that was where he had his bed, and where he dwelt. That case was an authority for saying that there cannot be constructive residence. This boy left Warwickshire, his mother had left the county, and his father, who still resides there, has no intention of having him back, but immediately before he committed the offence he ate, slept and dwelt in the Isle of Wight.

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[2] [1915] 3 K.B. 699, 705.

[Lord Goddard C.J. He stayed three days in the Isle of Wight and left, having no intention of returning. There was evidence on which the juvenile court could find that he was resident in Warwickshire because he had spent some years in children's homes within the county for which the Warwickshire County Council was responsible. In addition his father still lives in the county. The Act obviously contemplates that a child shall be sent to an approved school within the area in which he is resident if that is known. The words of section 90 (2) limit the contentions on which a local authority can appeal against an order made by the juvenile court. Section 70 of the Act provides for the case where a child or young person is resident in England or where he is resident out of England. In this case quarter sessions found that the boy's residence was not known.]

[Lynskey J. In those circumstances the order of the juvenile court should stand because the court has no power to vary the order made except by substituting either the name of another local authority or a statement to the effect that the child or young person is resident out of England.]

Quarter sessions have power by reason of the Summary Jurisdiction (Appeals) Act, 1933, s. 1, to confirm, reverse, or vary the decision of the court of summary jurisdiction or make such other order as they think just, and by such order exercise any power which the court of summary jurisdiction may have exercised. The court of summary jurisdiction includes the juvenile court. Therefore quarter sessions, having found that the boy was resident neither in Warwickshire nor in the Isle of Wight properly varied the order by substituting the Isle of Wight County Council which was the authority within whose district the boy committed the offence.

Brodrick replied.

Lord Goddard C.J. This is a case stated by the appeal committee of the quarter sessions for the Isle of Wight, before whom an appeal was brought by the Isle of Wight County Council against an order made by a court of summary jurisdiction under section 90 (2) of the Children and Young Persons Act, 1933.

The case raises a curious and interesting point, and I am conscious that in allowing this appeal the result may not appear to be conspicuously just. The conclusion to which we have come is based on the fact that there is a curious lacuna in section 90 of the Children and Young Persons Act, 1933, to which it is desirable, if our decision is not reversed by any higher court, that the attention of the appropriate authority, namely, the Home Office, should be called at a very early date with a view to its considering an amendment of the law which might, I think, be probably effected by a one-section Act.

The matter arises in this way: In September, 1951, a boy named Allan White was brought before the justices in the Isle of Wight sitting as a juvenile court, charged with stealing a yacht. He had gone on board the yacht, which was lying in Bembridge Harbour, and endeavoured to sail it to France, but he was caught by a destroyer and brought back, and was charged with stealing the yacht and was convicted. The juvenile court in the Isle of Wight committed him to an approved school and made an order on the County of Warwick, as being the local authority responsible for his maintenance. I have no doubt that they did that because the information before them was that his father lived at Rugby. The Warwickshire authorities having been served with that order, but not having been present at the hearing before the justices—which apparently is not necessary—took advantage of section 90 (2) of the Children and Young Persons Act, 1933, and appealed to a court of summary jurisdiction sitting in the Island, contending that the boy White was resident in the district of some other local authority than theirs, and that, therefore, some other local authority ought to be named in the order instead of the Warwickshire County Council. The justices heard the appeal and substituted the name of the Isle of Wight County Council. The Isle of Wight County Council then took advantage of section 90 (3) of the Act and appealed against that order to quarter sessions. Quarter sessions upheld the order and stated a case.

[His Lordship then stated the facts, and continued:] On the facts the appeal committee found that the boy was not resident either in Warwickshire or in the Isle of Wight, and this court cannot see that they have any power to reverse that finding of fact and to say that, because the boy was sleeping rough in the Isle of Wight for two nights, he must be deemed to have been residing in the Isle of Wight. At any rate, he seemed to have no intention of residing there, or, if he had gone there thinking that he would find work, he seems to have abandoned his intention very quickly, because he boarded the yacht and sailed away. The case seems to me to be wholly different from what might have been the position if he had gone into service on the Isle of Wight with a farmer or at an hotel, because then, like any other servant, he would have been residing there, which was the state of affairs in *Stoke-on-Trent Borough Council* v. *Cheshire County Council.*[1]

That being the position, when this boy was brought before the justices and found guilty of larceny, they had to consider, and no doubt did consider, the provisions of section 70 of the Act. That section (as amended by the Children Act, 1948, s. 60, Sch. III) provides: "(1) Every approved school order shall "contain a declaration—(*a*) as to the age; and (*b*) as to the "religious persuasion; of the child or young person with respect "to whom it is made. (2) Every approved school order, other "than an order . . . made by reason of the commission of an "offence under section 10 of this Act (which relates to the "punishment of vagrants preventing children from receiving "education), shall name the local authority within whose district "the child or young person was resident, or if that is not known, "the local authority or one of the local authorities within whose "district the offence was committed or the circumstances arose "(as the case may be) rendering him liable to be sent to an "approved school." Then it is provided in (*b*): "In the case of "a child or young person not resident in England, the order shall, "instead of naming a local authority, state that he was "resident outside England." Therefore, when the case is before the juvenile court they may inquire and, indeed, I think that they must inquire, where the boy is resident. If they can find where he is resident they put the place of residence in the order, and the name of the local authority having authority over the place of residence, but if they cannot find where he is resident, they should put in the district in which the offence was committed. The third case is where he is resident out of England, but we can leave that out of account for the moment. When this boy was brought before the juvenile court it seems to me that if they had not found that he was resident in Warwickshire—and they obviously found he was resident in Warwickshire because he had been brought up by the Warwickshire County Council and his father lived there—they could have inserted his place of residence as the Isle of Wight because the offence was committed there. They did not do that—they put in Warwickshire—and that was the order.

We now come to the section under which this curious difficulty arises. Under section 90 (2) of the Act it is provided: "A court

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[1] [1915] 3 K.B. 699.

"by which an approved school order is made shall cause a copy "thereof to be served forthwith on the local authority named in "the order." The local authority does not have to be served until the order has been made. Then: "and if that authority "desire to contend that the person to whom the order relates "was resident in the district of some other local authority or "was resident outside England they may, by notice in writing "given at any time within three months after the service upon "them of the order, appeal—(*a*) if the order was made by a "petty sessional court, to a court of summary jurisdiction acting "for the same petty sessional division or place; and (*b*) if the "order was made by a court which was not a petty sessional "court, to a court of summary jurisdiction having jurisdiction in "the place where that court sat, or in the place from which the "person to whom the order relates was committed for trial, and "if, upon the hearing of the appeal, the court is satisfied that "the person to whom the order relates was resident in the district "of that other local authority, or was resident outside England, "the court may by order vary the approved school order by substituting therein the name of that other authority or, as the "case may be, a statement that the said person was resident "outside England."

The curious thing about that section is that the draftsman has entirely overlooked the fact that if it cannot be found where the boy lives, then the place to be named in the order is the place where the offence was committed. Section 74 of the Children Act of 1908 did make such a provision, but there is this curious lacuna in this Act that this section for some reason, which I can only assume to be an oversight, has omitted to deal with the case of a local authority being able to say: "This boy does not "reside in our district and the district to be named in the "order is the district where the offence was committed." It only gives the local authority power to go to the court and say: "He "does not reside in our district but in the district of some other "local authority."

What is to be done in a case where a local authority satisfies the court that the boy does not reside within its district but cannot show where he does reside? The section has not made any provision for it, but the power that is given by the section to the court on the appeal or application—the statute calls it an appeal —is to insert the name of another local authority where it is proved that the boy resides in the district of that local authority. It does not, as it appears to me, give any power to the court to insert into the approved school order, where proceedings are taken under section 90 (2), the name of the local authority in whose district the offence was committed. There is no doubt that it ought to; at least, it would appear that it ought to, and we can only think that this was an unintentional slip on the part of the draftsman.

Unless the court can insert the name of another local authority on it being proved that the person to whom the order relates is resident there, which is the only power that is given to the court, it follows that the order made by the juvenile court must stand. The result does not seem just to the Warwickshire County Council, but an order was made on them and they cannot show that this boy is resident in the district of any other local authority or that he is resident out of England, and therefore there does not seem to be any power in the court to vary the order. The appeal committee varied the order by inserting the name of the local authority not where the boy resided but where the offence was committed, and it does not appear to me that the section gives them power to do that.

Mr. Marshall invited us to say that the order should be upheld because the appeal committee of quarter sessions ought to have held that the boy was resident in the Isle of Wight simply because he had slept there for the two nights preceding the offence. The justices stated that they found as a fact that he did not reside in the Isle of Wight and, on the evidence, we think that the justices were amply justified in coming to that conclusion. I do not hesitate to say that I should have come to that conclusion on the evidence. I do not think that it can be said that this boy resided anywhere. He was in the Isle of Wight, which he left; he had no place in which to live there, and I think that it would be wholly wrong to say that he was residing there. The Act is obviously contemplating the case in which the person to whom an order relates has no residence because it is not known and cannot be proved that he has a residence, and that is why it provides that an order may be made on the local authority at the place where the offence was committed.

Another point which was taken was that it could be said that this could have been treated by the quarter sessions as an appeal against the juvenile court's order, that is, the original order. I think that that was the way in which quarter sessions did regard the matter, because they thought that that was the way of doing what they considered to be justice and of getting over the difficulty caused by this lacuna. But that is taking a very bold step and is really writing something into the Act which is not there. This appeal is admittedly brought under section 90 (3) as an appeal against an order which was made under section 90 (2), and it cannot be an appeal against the original order, which was made a long time before, and is not the order against which the appeal was made. Section 90 (2) and (3) appear to me to give a particular and peculiar remedy to local authorities. They are given the special right of appeal to a petty sessional court, under subsection (2), and I think that that is their only right. If they find that they have been named in the order when they ought not to have been named, the remedy given to them is to make an application or an appeal under section 90 (2). Then, if the justices either refuse to make an order or do make an order, the party affected thereby is given an appeal to quarter sessions under subsection (3). I have the greatest doubt whether the local authority can, under those circumstances and in such a case as this, appeal to quarter sessions under section 102, which does appear to provide for appeals to quarter sessions; it says in subsection (1) (*c*) (as amended by the Children Act, 1948, s. 60, Sch. III): "In the case of an order requiring a person to contribute in respect of himself or any other person, by the "person required to contribute; . . ." But it is not necessary to decide the point. I think that that is an appeal which is given to a parent or guardian or a person who stands in loco parentis who may be ordered to contribute to the upkeep of the child. I think that the local authority's appeal is one which is given by section 90 and no other.

For these reasons, not without considerable hesitation and some regret, I think that this appeal must succeed.

Lynskey J. I agree, and for the reasons given by my Lord. I only desire to say that I hope that steps will be taken to fill in the gap which appears to exist in section 90 of the Act.

Pearson J. I also agree. One is always rather reluctant to come to a conclusion that there is a lacuna in an Act, but I think that in this case there is no means of avoiding that unfortunate conclusion. I agree with the order proposed.

Appeal allowed.
Leave to appeal granted.

Solicitors: *County Solicitor, Isle of Wight County Council; Sharpe, Pritchard & Co., agents for Deputy Clerk, Warwickshire County Council.*

MARELA LD. *v.* MACHOROWSKI.

C. A.

[Plaint H. 2266.]

1953
Mar. 23.

Denning,
Morris and
Romer L.JJ.

Landlord and Tenant—Rent restriction—Possession—Closing order made by justices—Premises unfit for human habitation—Whether premises taken out of protection of Rent Acts by closing order—Public Health (London) Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 50), *Sch. V—Housing Act*, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 156 (1) (*e*).

Premises which were protected by the Rent Acts were closed by an order of justices on the ground that, by reason of the leaking condition of the roof, they were unfit for human habitation. The order was made under the provisions of Sch. V to the Public Health (London) Act, 1936. Thereupon the landlord claimed, and was granted by the county court judge, an order for possession on the ground that section 156 (1) of the Housing Act, 1936, [which provides that nothing in the Rent Acts " shall . . . " prevent possession being obtained . . . (*e*) of any part of a building or underground room by any owner thereof in a case where a " closing order is in force in respect thereof "] took the premises out of the protection of the Rent Acts. On appeal by the tenant:—

Held, that paragraph (*e*) of section 156 (1) of the Housing Act, 1936, applied only to closing orders made under section 12 of that Act, and not to a closing order made under Sch. V to the Public Health (London) Act, 1936, which was merely a means of enforcing a nuisance order and could be revoked when the necessary repairs had been executed.

Appeal from Judge Engelbach, sitting at Shoreditch county court.

The plaintiffs, Marela Ld., were the owners of premises, No. 86 Brick Lane, London, E., and the defendant, Mrs. Machorowski, was the tenant of rooms on the ground floor, for which she paid a rent of 12s. 3d. a week. The tenancy was protected by the Rent Acts.

On April 2, 1952, a closing order was made by justices, pursuant to the Public Health (London) Act, 1936, on the ground that the premises were unfit for human habitation because the roof was not weatherproof, the second floor front bedroom ceiling was damp, and the door leading to the roof was off its hinges and rain was coming in. Thereupon the plaintiff landlords sought to recover possession of the rooms tenanted by the defendant, and on December 9, 1952, the county court judge made an order in their favour, holding that the words " closing order " in section 156 (1) (*e*) of the Housing Act, 1936, included a closing order made under the Public Health (London) Act, 1936, and that therefore the tenancy of the defendant was taken out of the protection of the Rent Acts. The defendant appealed.

Michael L. M. Chavasse for the defendant. The county court judge was wrong in law in holding that the defendant lost the protection of the Rent and Mortgage Interest Restrictions Acts by reason of a closing order made by justices under Sch. V to the Public Health (London) Act, 1936; and in holding that the expression "closing order" contained in section 156 of the Housing Act, 1936, covers a closing order made under the Public Health (London) Act. The judge found that it was section 156 which entitled him to grant the plaintiff possession. That section refers only to closing orders made under section 12 of that Act. Paragraph (*e*) of section 156 (1) refers, as does section 12, to a closing order of "any part of a building or underground room," and gives an exception from the Rent Acts. A closing order under the Public Health (London) Act is an order for the closing of the whole building. It is a means of enforcing the abatement of a nuisance, and once repairs have been executed, and the nuisance abated, the order may be revoked. There is nothing in the Housing Act to support the idea that a closing order under the Public Health (London) Act excludes the protection given by the Rent Acts. Under the Housing Act a demolition order can be made, but under the Public Health (London) Act only a closing order can be made.

A. A. Spears for the plaintiffs. If section 156 of the Housing Act does not refer to the present case, it is submitted that logical necessity requires that the Rent Acts should not afford protection to a tenant after a closing order has been made by justices under the Public Health (London) Act. The purpose of the legislation is to maintain public health, and one necessity is the elimination of insanitary dwellings. If the Rent Acts are excluded in one of these statutes it must be excluded in both, because they both have the same object in view. It is submitted that these statutes, having a common history, using common terms, and having common special sections, should be construed together. It would be unreasonable if in the same circumstances a closing order would have different effect under different Acts. If premises are unfit for human habitation no one should be permitted to live in them, and the relationship of landlord and tenant must be terminated. The contractual tenancy has been terminated by notice to quit.

DENNING L.J. This is a claim by Marela Ld. against Mrs. Machorowski for possession of rooms at the rear of the ground floor at 86 Brick Lane, London, E. The rooms were let by the company to the defendant at a rent of 12s. 3d. a week. The question is whether she is protected by the Rent Acts. It arises in this way. On April 2, 1952, justices made an order saying that it had been proved that a nuisance existed on the premises, No. 86 Brick Lane, in these respects: the roof was not weatherproof, the second floor front bedroom ceiling was damp and the door leading to the roof was off its hinges and rain was coming in. On proof of those nuisances, the justices held that the premises were unfit for human habitation and, in pursuance of the Public Health (London) Act, 1936, they prohibited the use of the dwelling-house for human habitation. That was an order known as a closing order. It was made, it is important to notice, under Sch. V to the Public Health (London) Act, 1936, and it was made in respect of the whole house. It is said by the landlords that the effect of that closing order is to take the case outside the Rent Acts.

The Rent Acts themselves prohibit an order for possession being made except in certain circumstances prescribed in the Schedule to the Act of 1933. None of those circumstances exist here; but it is said on behalf of the landlords that section 156 of the Housing Act, 1936, takes the case out of the Acts. Section 156 says that "nothing in the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, . . . shall . . . prevent possession being obtained . . . (*e*) of any part of a building or underground room by any owner thereof in a case where a closing order is in force in respect thereof." The county court judge has held that that section applies. He has held that a closing order has been made in respect of this house, and that, therefore, section 156 (1) (*e*) takes it out of the Acts.

I find myself unable to agree with the judge. It is plain, to my mind, that paragraph (*e*) refers only to closing orders which are made under section 12 of the Housing Act, 1936, and that it does not apply to closing orders made under Sch. V to the Public Health (London) Act, 1936. Paragraph (*e*) refers to a closing order "of any part of a building or underground room," and so does section 12 of that Act; it does not refer to a closing order for a whole house. That is sufficient to determine this case. This closing order was not made in respect of part of a building or underground room under the Housing Act, 1936; it was made in respect of the whole dwelling-house under Sch. V to the Public Health (London) Act, 1936.

Mr. Spears, realizing this difficulty, sought to say that by analogy or necessity we ought to hold that a closing order under the Public Health (London) Act, 1936, also takes the case out of the operation of the Rent Acts. He says that it is absurd that there should be a closing order preventing the use of the house and yet the tenant should still be allowed to occupy it. The answer to that argument is this: a closing order under the Public Health (London) Act is a different thing altogether from a closing order under the Housing Act. A closing order under the Public Health (London) Act, 1936, is just one of three means of enforcing a nuisance order. As paragraph 8 of Sch. V says: "A nuisance "order may be an abatement order, a prohibition order or a "closing order, or a combination of such orders." It is only a way of enforcing requirements as to repair. It is an order made by justices to ensure that the work is done. Once the work has been done, and the house rendered fit, then the closing order can be revoked. But a closing order under the Housing Act, 1936, is made by the local authority, and it is made so as to ensure that the premises are not used. It is the counterpart of a demolition order. In cases where a whole house would be demolished, a part of a building will be closed. It must not be used. The occupants have to move out and the local authority then have to pay the cost of removal to which the occupants are put. But there is nothing in the Public Health (London) Act, 1936, providing for the cost of removal.

In my opinion this matter can be determined only under the wording of the Acts themselves. The relevant section of the Housing Act, 1936, gives an exception from the Rent Acts in respect of demolition orders or closing orders made under that Act, but not in respect of a closing order made in respect of the Public Health (London) Act, 1936. In my opinion, therefore, this appeal should be allowed and judgment be entered for the defendant.

Morris L.J. I am of the same opinion. It is common ground that the provisions of the Rent Restriction Acts apply to the premises in question, and there is nothing in the various Rent Acts under which the plaintiffs are entitled to possession. In those circumstances the plaintiffs turn to section 156 (1) (*e*) of the Housing Act, 1936, the words of which are: "of any part "of a building or underground room by any owner thereof where "a closing order is in force in respect thereof." I fully agree with my Lord that those words do not apply to the present case, and that they have reference to a closing order under section 12 of the Housing Act, 1936. In spite of the argument of Mr. Spears, it seems to me that, in the absence of some statutory exclusion of the Rent Acts, those Acts continue to apply and the plaintiffs are not entitled to possession.

It is also of consequence to point out, as my Lord has done, that under paragraph 9 of Sch. V to the Public Health (London) Act, 1936: "A petty sessional court, if satisfied that a dwelling-"house in respect of which a closing order is in force has been "rendered fit for human habitation, may declare that it is so "satisfied and revoke the closing order." If the defects referred to in the closing order are put right, then there is no reason why the petty sessional court should not revoke the closing order. I agree that this appeal must be allowed.

ROMER L.J. I also agree, and there is very little I want to say, because the whole ground has been covered. The only possible footing on which the plaintiffs could succeed here, in my view, would be by showing that the case comes within section 156 (1) (*e*) of the Housing Act, 1936, and the facts, as I see them, show quite plainly that that has no application: first, because the closing order which was made on April 2, 1952, was not made under the Housing Act, 1936, at all, but under the Public Health (London) Act, 1936, which is quite a different statute; and, secondly, because the closing order was made in relation to the whole of the premises, No. 86 Brick Lane, and subsection (1) (*e*) of section 156 of the Housing Act, 1936, by its very terms, applies only to cases where a closing order is in force in respect of a part of a building.

Therefore, it seems to me that, in the face of those two difficulties, it is impossible for the landlords here to rely on that particular statutory enactment and, inasmuch as there is no other statutory enactment which removes these premises from the general scope of the Rent Restriction Acts, it necessarily follows that the tenant is entitled to the protection of the Acts, that the landlords cannot succeed in their attempt to recover possession, and that this appeal must be allowed.

Appeal allowed.

Solicitors: *Neil Maclean & Co.; Sidney Nyman & Co.*

A. W. G.

C. A.

1953
March 6.

Evershed M.R.,
Jenkins and
Romer L.JJ.

BECK *v.* SCHOLZ.

Landlord and Tenant—Rent restriction—Tenant of London flat—House in the country—Infrequent visits to flat—Furniture left and caretaker installed—Whether occupied as a "home"—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3 (1).

The landlord of a flat in London sought possession on the ground that the statutory tenant had abandoned possession. The tenant had left furniture in the flat and two persons described as caretakers were living there, paying no rent but keeping the premises in good condition and available for occasional visits by the tenant and her husband, who lived in a house, purchased in their joint names, in Luton, Bedfordshire. The tenant slept there four or five times in the year and her husband on an average about once every two months. On appeal from the county court judge, who refused an order, holding that he was bound so to do by *Langford Property Co. Ld.* v. *Tureman* [1949] 1 K.B. 29:—

Held, that the true test to be applied was whether the premises of which possession was sought were in the personal occupation of the tenant as the tenant's "home," or, if the tenant had more than one home, as one of his homes. It was necessary to show an animus possidendi as a home, and, in addition, a corpus possessionis. It was not sufficient to show that the tenant had left furniture and a caretaker and desired to retain possession because he or she occasionally found it convenient to resort to the premises, and the court had not so held in *Langford Property Co. Ld.* v. *Tureman*.

That test could not be applied on the facts as found by the county court judge and the case was, therefore, remitted to him to determine the question of fact whether the flat was personally occupied by the tenant as a home.

Langford Property Co. Ld. v. *Tureman* [1949] 1 K.B. 29; 64 T.L.R. 517; [1948] 2 All E.R. 722, explained.

Appeal from Judge Bensley Wells, sitting at Marylebone county court.

On February 9, 1943, the predecessor in title of the plaintiff, Alfred Beck, granted a tenancy of a flat on the first floor of 11 Canfield Gardens, Hampstead, to one Meta Muller, for the term of 12 months, and thereafter quarterly, at the rent of £80 per annum. In 1945, the tenant, having married a Mr. Scholz, went to live at Luton, Bedfordshire, where they purchased a house in their joint names. Mrs. Scholz left furniture in the flat at Hampstead and she and her husband visited the flat from time to time. In January, 1951, the landlord, Alfred Beck, sought unsuccessfully to obtain an order for possession of the

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flat, offering alternative accommodation on the second floor. His application failed because the alternative accommodation was unsuitable for Mrs. Scholz, who was suffering from arthritis. In February, 1952, a Mr. and Mrs. Schweitzer came to the flat as licensees of the tenant. They paid no rent, but kept the flat in good condition and ready for the occasional visits of Mr. and Mrs. Scholz; they were described as caretakers.

On April 24, 1952, the landlord issued a summons for possession on the ground that Mrs. Scholz, the tenant, had abandoned possession of the flat. The evidence of Mrs. Scholz was that during the year immediately preceding the issue of the summons she had slept in the flat about four or five times, but she explained that she had been under treatment for her arthritis abroad and in hospital in England and had not, therefore, been able to visit the flat; it was not, however, made clear whether she had used the flat more frequently before that period. Mr. Scholz said that he had to come to London on business three or four times each week, but that he normally returned to Luton and only slept in the flat about "two to ten" times during the material 12 months.

Judge Bensley Wells found that, though the tenant and her husband had made little use of the flat during the material period, they were anxious to retain it as a "pied-à-terre," and purporting to follow *Langford Property Co. Ld.* v. *Tureman*,[1] he held that the landlord was not entitled to possession.

The landlord appealed.

H. Harris for the plaintiff landlord. Judge Bensley Wells found as a fact that the flat was merely an amenity, "a "pied-à-terre," and on that finding of fact he was wrong in holding, as he did, that he was bound by *Langford Property Co. Ld.* v. *Tureman* [1] to refuse to make an order in favour of the landlord. The evidence is less strong in this case in favour of two "homes" and it was open to the judge to find that there was not sufficient personal occupation to justify protection. The Rent Acts may protect a tenant who leaves his home, for whatever reason, if he makes it clear that he intends to return; but that type of case must be distinguished from the type of case where the tenant has a home apart from the premises of which possession is sought and who comes occasionally to stay in the premises in question. Where the tenant has an alternative

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[1] [1949] 1 K.B. 29; 64 T.L.R. 517; [1948] 2 All E.R. 722.

"home," the onus is on him to show either that the occupation of the premises is necessary or that he is using the premises to a substantial extent as his home.

[EVERSHED M.R. If these tests are to be regarded as alternatives it would apparently be sufficient to show that the tenant had to come up to London for business reasons very occasionally, which on the authorities may not be right; nor is it clear that the cases go so far as to say that the occupation must be substantial, and that if the tenant is not occupying the premises as his home then he must show that he is occupying for some other good reason. It is clear from *Langford Property Co. Ld.* v. *Tureman*[1] that the tenant may occupy two premises as his "home" and that both may be protected.]

But the tenant must occupy the premises substantially. The intention of the Rent Act legislation was to protect tenants against the effects of the housing shortage and that intention implies the limits of the protection afforded. The Acts will not protect a mere pied-à-terre which is used very infrequently by a tenant who has a home elsewhere. This tenant was not in personal occupation of these premises as her "home." In *Menzies* v. *Mackay*[2] (which was not cited in *Langford Property Co. Ld.* v. *Tureman*[3]) it was laid down that a tenant alleging that he had two "homes" must show that he is in substantial occupation of the premises in question as a "home." It is not sufficient, for example, to show that he visits the premises at week-ends if he only goes occasionally.

[EVERSHED M.R. The test is whether the tenant is in occupation. That is a question of fact. In *Menzies* v. *Mackay*,[4] on the facts, the occupation was not sufficient, whereas in *Langford Property Co. Ld.*[5] it was sufficient. The Scottish case is not of general assistance. This matter is discussed and accurately summarized in Megarry, Rent Acts, 6th ed., pp. 152, 153.]

[Counsel referred to *Hallwood Estates Ld.* v. *Flack*.[6]]

D. Hunter (*C. L. Hawser* with him) for the defendant tenant. The sole question here is whether the tenant was in personal occupation, and that is a question of fact which the county court judge decided in the tenant's favour. It is true that she had not visited the flat frequently during the past 12 months, but that is explained by her illness, which unavoidably prevented her from going there more often. It was not shown that her visits were previously as infrequent, and indeed in the previous proceedings the judge must have been satisfied that this was her "home." In addition to personal occupation by the tenant it is relevant to consider that of her husband and of the caretakers, the Schweitzers, for a tenant can remain in occupation by a caretaker or other licensee; there being an essential distinction for this purpose between the effect of a subletting by the tenant and occupation by a licensee.

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[1] [1949] 1 K.B. 29; 64 T.L.R. 517; [1948] 2 All E.R. 722.

[2] 1938 S.C. 74.

[3] [1949] 1 K.B. 29.

[4] 1938 S.C. 74.

[5] [1949] 1 K.B. 29.

[6] [1950] W.N. 268; 66 T.L.R. (Pt. 2) 368.

[EVERSHED M.R. The presence of a caretaker in premises may be evidence on which the court can find that the tenant's absence is only temporary and that he intends to remain in possession, but in a "two-home" case a tenant cannot occupy one of the alleged "homes" by a licensee caretaker and he, himself, hardly go there.]

There is no real distinction between the "two-home" type of case and any other, for if the tenant is away from home he must be somewhere and if he leaves a caretaker in premises it makes no difference whether he is on the move or whether he is residing in his other "home." In *Wigley* v. *Leigh*[7] the occupation by a servant during the illness of the tenant was a sufficient occupation.

[EVERSHED M.R. But in that case the premises were undoubtedly the tenant's "home," though for the moment she was not living there. Here it is not possible to say that the tenant's illness was the sole reason why she was not living in the flat. The test is whether the tenant is in personal occupation of the premises as her "home" or as one of her homes. Here the flat seems to have been merely a convenience.]

The judge's finding was that it was a pied-à-terre, and the expression pied-à-terre can be ambiguous for it can be argued that it means either a mere amenity or a "home." I submit, however, that it is not ambiguous in the way that Judge Bensley Wells used it. He meant that it was a "home." The phrase is capable of meaning a "home," and it was so used in *Langford Property Co. Ld.* v. *Tureman.*[8] Moreover. quite apart from the finding on that point, there is sufficient evidence before this court to find, as a fact, that this was the tenant's "home." The visits of Mrs. Scholz and her husband, and the presence of the caretaker, are a sufficient indication of her animus possidendi (though it is conceded that the presence of the caretakers may not, perhaps, point unequivocally to an animus possidendi as a "home"). [Counsel referred to *Elliott* v. *Camus*.[9]] In *Langford Property Co. Ld.* v. *Tureman*[10] the tenant only used the premises as a temporary resting place but it was held that he had a sufficient animus possidendi. It may be a question of degree whether a tenant is in sufficient occupation, but there is a finding of fact on that matter in my favour. If, however, there is any doubt as to the extent and quality of the finding, the doubt should be resolved in favour of the judge's decision.

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[7] [1950] 2 K.B. 305; [1950] 1 All E.R. 73.

[8] [1949] 1 K.B. 29.

Harris replied.

Evershed M.R. This is an appeal from a judgment of Judge Bensley Wells whereby he refused to make an order for possession in respect of rent restricted premises, a flat at No. 11 Canfield Gardens, Hampstead, on the application of the proprietor of the flat. The case is another illustration of one of the more difficult problems which have emerged from the rent restriction legislation, namely, the problem of the so-called "two-home" man. The classic instance of that type of case is *Langford Property Co. Ld.* v. *Tureman*,[1] a decision of this court. In that case the tenant, a Greek, had a home at Great Missenden, Buckinghamshire, but he had to work during the week in London. During the working week he "habitually" (I take the word used by Tucker L.J.) slept at a flat in London. In that respect, he obviously ordered his life in the same way as do many other people who have a house in the country but who, as they carry on their business or profession in London, have also a flat or some abode in London. In those cases, as a matter of common sense and fact, it can be fairly and truthfully said that the country house and the London abode are each the man's "home."

In the present case, the facts, so far as they have been elucidated by the judge, seem to me far less in favour of a "two-homes" result than were the facts in *Langford Property Co. Ld.* v. *Tureman*.[1] [His Lordship stated the facts and continued:] On those facts Judge Bensley Wells concluded: "The evidence left me in no doubt that though the defendant "and her husband made little use of the flat during the past "12 months, they were anxious to retain it as a pied-à-terre."

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[9] [1949] 1 C.L.C. 8846.

[10] [1949] 1 K.B. 29.

[1] [1949] 1 K.B. 29; 64 T.L.R. 517; [1948] 2 All E.R. 722.

Mr. Hunter has justly pointed out that the phrase "pied-à-terre" is ambiguous. It is sometimes used to mean simply a convenient resort. In another context a man may refer to his home as a pied-à-terre, particularly if it is of small dimensions. But whatever it means in this context, or may mean in other contexts, it appears to me that the judge took the view that the decision in *Langford Property Co. Ld.* v. *Tureman* [1] compelled him to hold as a matter of law that, provided that there was an intention to retain for any purpose, including that of mere convenient occupation on occasions, and provided that that intention was evidenced by a corpus possessionis, such as the instalment of a licensee or caretaker and the retention of personal furniture, he was bound to hold in favour of the defendant.

I feel a certain sympathy with the judge, for in *Langford Property Co. Ld.* v. *Tureman* [1] this court came to the conclusion that the same county court judge had been in error in deciding (as he had decided) against the tenant. He may have been anxious not to appear to depart from *Langford Property Co. Ld.* v. *Tureman*.[1] Nevertheless, I cannot see that it would be in accordance with the main principle and purpose of the rent restriction legislation to hold that a man may have statutory protection for any premises to which he may occasionally find it convenient to resort, and in which he may keep furniture and instal a caretaker, when in no true sense of the term are those premises his "home," for example, where they are merely used as a matter of convenience for occasional visits. After all, the purpose of the Acts, as Scrutton L.J. forcibly pointed out many years ago, is to protect occupying tenants against the hardship occasioned by the shortage of houses.

In another case before this court, *Hallwood Estates Ld.* v. *Flack*,[2] I ventured to suggest that "the doctrine of the 'two-home' man . . . should be regarded with some reserve." That passage is cited in Megarry on The Rent Acts, 6th ed., p. 153, where, in my judgment, he correctly summarizes this topic.

The question which Judge Bensley Wells had to answer may, I think, properly be called a jury question to be determined by applying ordinary common sense. The word "home" itself is not easy of exact definition. But the question posed, and to be answered by ordinary common-sense standards, is whether the

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[1] [1949] 1 K.B. 29; 64 T.L.R. 517; [1948] 2 All E.R. 722.

[2] [1950] W.N. 268; 66 T.L.R. (Pt. 2) 368.

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particular premises are in the personal occupation of the tenant as the tenant's "home," or, if the tenant has more than one home, as one of his homes. Occupation merely as a convenience for such occasional visits as I have suggested would not, I think, according to the common sense of the matter, be occupation as a "home." Mr. Hunter has drawn our attention to the analogous cases where a man who is about to retire seeks the protection of the Rent Acts for his home or for the place which he has been maintaining as his home, and to which he intends to go when his retirement takes effect. Those cases were developments of the classic example given, again by Scrutton L.J., if I remember rightly, of the sailor who has to go on long voyages abroad but who retains his home in England none the less. In those cases, it is no doubt true to say that the test is whether there is an animus possidendi and, in addition, a corpus possessionis. But as Jenkins L.J. observed, the mere use of the phrase animus possidendi requires the further explanation, animus possidendi as what?—as a convenience, as a resort, or as a home?

Judge Bensley Wells quoted the following passage from the judgment of Tucker L.J., the leading judgment, in *Langford Property Co. Ld.* v. *Tureman*[3]: "In my view, there was no evidence "upon which the learned judge could come to the conclusion at "which he arrived, namely, that this defendant Athanassoglou "was not in personal occupation of this flat. The facts found "by the county court judge showed that Athanassoglou habitually "used the flat as a place in which to sleep when on business in "London. His bona fides and truthfulness were not attacked. "The fact that he has a house at Great Missenden which is also "his home does not in any way prevent other premises which he "may have occasion to use from also being his home." He referred to *Skinner* v. *Geary*[4] and continued: "It" (that is, the London flat) "contained his furniture; he slept there, whenever "he required to do so for the purpose of his business, which was, "on an average, twice a week, and his friends were residing there "with his permission. Although I appreciate that there may be "borderline cases, I think it is quite clear that the present case "falls on that side of the dividing line which makes it amount to "personal occupation by Athanassoglou." Judge Bensley Wells concluded (though obviously with regret), "In face of that I do "not think that I should be doing my duty if I decided in the "plaintiff's favour in this case." I think (in view of the earlier finding, which I have already read, that this flat was but a pied-à-terre), that Judge Bensley Wells took the view that *Langford Property Co. Ld.* v. *Tureman* [5] was conclusive in favour of a tenant where the tenant's occupation was merely that of a place of convenient resort and where it could not fairly be said, as a common-sense matter, that the premises in question were the home of the tenant and were in his personal occupation as such. I do not think that *Langford Property Co. Ld.* v. *Tureman* [5] has that effect.

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[3] [1949] 1 K.B. 29, 33.

[4] [1931] 2 K.B. 546; 47 T.L.R. 597.

I hope that I have made tolerably clear what I conceive to be the principle involved in *Langford Property Co. Ld.* v. *Tureman* [5] and the extent to which it can be treated as covering cases where protection is sought for a second establishment. As I have already said, the question is a jury question to be decided in accordance with good sense; and, on the facts of this case, there is insufficient material for us to conclude that matter of fact. Judge Bensley Wells, taking, as I think, a view of *Langford Property Co. Ld.* v. *Tureman* [5] which was not justified, was not concerned, perhaps, to go more fully into the facts. I should not feel satisfied on the material before me that I could give a just conclusion on the facts. I, therefore, think that the court should take the somewhat unusual procedure of allowing this appeal and referring the case back to the judge to answer the question of fact, whether, as a matter of common sense, in his view this flat was occupied at the material dates by the defendant, that is, personally occupied by her as a home. Accordingly, this appeal should be allowed and an order remitting the case to the county court judge should be made, coupled with a direction that it will be open to the parties to bring such further evidence as the judge may think proper to allow. That matter is entirely at the judge's discretion on the rehearing. The costs of the trial from which this appeal comes, and the costs of the further hearing, should be in the discretion of the county court judge.

Jenkins L.J. I agree.

Romer L.J. I also agree.

Appeal allowed; case remitted.

Solicitors: *Smith (Howard) & Harston; Arnold & Co.*

E. D.

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[5] [1949] 1 K.B. 29.

C. A.

1953
Mar. 24.

Singleton, Denning and Romer L.JJ.

WALSH *v.* OATES.

[Plaint H. 495A.]

Highway—Easement—Private right of way, co-existent with public right—Closing order of highway made by quarter sessions—Whether private easement affected—Highway Act, 1835 (5 *&* 6 *Will.* 4, *c.* 50), *s.* 91.

Where a private right of way is co-existent with the public right to use a highway a closing order made by quarter sessions under the provisions of the Highway Act, 1835, extinguishes the public right but leaves unaffected the private easement.

Allen v. *Ormond* (1806) 8 East 4 applied.

APPEAL from Judge Archibald sitting at Halifax county court.

The plaintiff, Norman Francis Walsh, the owner of a house and property known as Whiskham Cottage, Miss Lister's Road, Halifax, claimed that Miss Lister's Road was a private road leading from Shibden Hall Road, Halifax, alongside the plaintiff's land and across land of which the defendant, Donald Firth Oates, was the owner, to public highways on the other side. By paragraph 3 of his statement of claim he alleged that he and his predecessors in title of the lands known as Whiskham Cottage and the several occupiers thereof, had for the full period of 40 years and more next preceding the commencement of the action, enjoyed as of right and without interruption the road known as Miss Lister's Road for the purpose of passing and repassing by themselves, their tenants, servants and licensees, on foot and with horses, carriages and other vehicles at all times and for all purposes, and he claimed the right so to do as a legal easement of way under section 2 of the Prescription Act, 1832, and also as having been used by him and his predecessors in title from time immemorial.

By paragraph 4 the plaintiff complained that on or about the beginning of the month of August, 1949, the defendant, who owned quarries on the side of the road opposite Whiskham Cottage, commenced to excavate or otherwise destroy the said road for the purpose of getting the fireclay or other minerals, and thereby was endangering his right of way. The plaintiff therefore claimed a declaration and certain injunctions.

It was not disputed that on January 7, 1943, Halifax Quarter Sessions had made an order under the Highway Act, 1835, closing part of Miss Lister's Road, including the whole of the defendant's section, and the defendant, while not admitting that the plaintiff or his predecessors in title had a right at any time to pass over his (the defendant's) part of the road, alleged that at the date of the order the whole of the road was a public highway and any private right of way was extinguished by the closing order.

The writ in the present action was issued on December 19, 1949, and by an order dated November 25, 1952, the action was remitted to the Halifax county court for trial. The case came on for hearing on January 17, 1953, when Judge Archibald gave judgment for the defendant, holding that the order of quarter sessions extinguished any private right which the plaintiff might have over the highway. The question whether the plaintiff had a private right of way was not investigated.

The plaintiff appealed and asked for a new trial on the ground that the judge was wrong in law and misdirected himself in holding that by virtue of the order of quarter sessions, made under the Highway Act, 1835, the rights of way enjoyed by the plaintiff and his predecessors in title had been terminated.

Frank Whitworth for the plaintiff. The short point raised by the appeal is whether the closing of a highway by quarter sessions under the Highways Act, 1835, has the effect of extinguishing any private easements which might exist over the highway and alongside the public rights. The county court judge has decided that point against the plaintiff, relying on a dictum of Cockburn C.J. in *Reg.* v. *Wallace*,[1] but that dictum is obiter. In Pratt & Mackenzie on the Law of Highways, 19th ed., at p. 16, it is stated that "where a private right of way already exists and the public "subsequently acquire a right of passage over the same course, "the public must take subject to the private right," and "If an "Act of Parliament gives power to extinguish the public right, "the private right will not be affected thereby, but will continue "to subsist": see *Wells* v. *London, Tilbury and Southend Railway Co.*[2] That case was decided under a private Act of Parliament, but in *Allen* v. *Ormond* [3] the court held that "where "a party has a certain special right of way granted to him he "may rest upon that title, and need not resort to a general "right, which may possibly be disputed by conflicting evidence; "especially in a case, like the present, of a public right of way "growing out of an occupation way." The county court judge misdirected himself. The question whether the plaintiff or his predecessors in title possessed a private right of way before the road became a public highway was not investigated in the court below and therefore if this court allows the appeal I ask that the case be remitted to the county court judge.

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[1] (1879) 4 Q.B.D. 641, 644.

[2] (1876) 5 Ch.D. 126.

[3] (1806) 8 East 4, 6.

G. A. Rink and *C. R. Dean* for the defendant. It is conceded that a private right of way can co-exist with a public right over a highway, and that at the date of the closing order the plaintiff had a private right; but the effect of the order made by quarter sessions was to extinguish that private right as well as the public right. The dictum of Cockburn C.J. in *Reg.* v. *Wallace* [4] was correct, though the defendant does not rely on it. The Highways Act, 1835, was passed at a time when there were many enclosure Acts, and it succeeded an Act one of the objects of which was to enclose unnecessary roads. The effect of the Highways Act is that the owner may physically close a road and if any person who has a title to use the road objects, and it is found that he is injured by the closing, then it cannot be closed. There is no question of weighing up the balance of convenience under the Act. Provided there is no appeal the justices may make an order which shall be "binding and conclusive on all persons whomsoever": see section 91. If that section means what the defendant contends, and what it says, then the order of quarter sessions extinguishes every private right.

SINGLETON L.J. This is an interesting point on which there is no direct authority. The plaintiff, Norman Francis Walsh, is the owner of a house and property known as Whiskham Cottage, Miss Lister's Road, Halifax. By his statement of claim he claims that Miss Lister's Road is a private road leading from Shibden Hall Road, Halifax, alongside the plaintiff's land and across land of which the defendant is the owner, to public highways on the other side. He asks for a declaration and certain injunctions. [His Lordship read material paragraphs of the statement of claim and defence, and continued:] I am anxious to say as little as I can about the facts of this case, because it seems to us that the matter must go back for a re-hearing. On each side of Miss Lister's Road, a little south of the plaintiff's house and land, there has been quarrying for some considerable time. On the west side of the road—that is, the side opposite the plaintiff's cottage—there has been quarrying recently. How recently, I do not know, and it does not matter for this purpose, but it is said that some part of Miss Lister's Road has been eaten into slightly. The defendant is the owner of the quarries and does the quarrying, and the plaintiff's case is that there has been interference with Miss Lister's Road opposite his cottage so that, if it is not now impossible for him to get his pony and trap along, it will be so before long, and it certainly will become dangerous. In those circumstances, the plaintiff seeks an injunction against the defendant. No facts have been proved.

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[4] 4 Q.B.D. 644.

The defendant, by his defence—and I only refer to that which is important on the point before this court—pleaded: "Until the order hereinafter mentioned the whole of the road "was a public highway. By an order of the Halifax Quarter "Sessions made on January 7, 1943, part of the road (including "the whole of the defendant's section) was stopped up entirely "as being unnecessary, because it had fallen into disuse." It was said that the plaintiff on the one side owned the road up to the centre of the road and that the defendant owned the other half, and that the only part of the road affected was the defendant's part.

Quarter sessions made an order on January 7, 1943. It recites the application for stopping up entirely a portion of a certain public highway situate and known as Miss Lister's Road, and it shows the portion on the plan, which runs for 370 linear yards, almost due south from the plaintiff's gateway. The order of quarter sessions was that that portion of the highway be stopped up entirely.

The writ in this action was issued on December 19, 1949. After the pleadings had been delivered, there was an order dated November 25, 1952, that the action be remitted to the Halifax County Court for trial, and the case came on before Judge Archibald on January 17, 1953. Counsel referred the judge to certain authorities, and, while Mr. McLusky was opening on behalf of the plaintiff, both counsel agreed, as the judge's notes show, that, if the judge took the view that in law the plaintiff's rights over the highway were destroyed when it was closed at quarter sessions, then there must be judgment for the defendant. The judge, having considered the authorities, gave judgment for the defendant. That decision was based on the supposition that the plaintiff could show that he had a private right of way over Miss Lister's Road and, I suppose, that, at some time after he had acquired that private right of way, Miss Lister's Road had become a highway. It was submitted on behalf of the defendant

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that, notwithstanding the private right of way, the fact that an order was made by quarter sessions, stopping up the highway, resulted in the private right of way being extinguished or wiped out.

The order of quarter sessions was made under the Highway Act, 1835, and the important sections are those from section 84 to section 91. The procedure used to be well known at quarter sessions, and, if the documents were all in order and no one appealed or opposed, it was a simple matter. If there was opposition, or that which is described in one of the sections as an appeal, there was a contest before a jury, and, if it was found that any person would be aggrieved by the order, the application failed. Of course, notices had to be given and justices inspected the road and gave their certificate, and the final performance was the enrolment of their certificate.

The question which the judge determined was that that procedure, which had taken place in the year 1943, was sufficient to wipe out any private right of way, any private easement, which the plaintiff had over that which became at some time Miss Lister's Road. The editors of the 19th ed. of Pratt & Mackenzie on the Law of Highways, put the position in this way on p. 16: "Where a private right of way already exists, and the public "subsequently acquire a right of passage over the same course, "the public must take subject to the private right; and a public "right of footway may accordingly be limited by a pre-existing "private right of carriage-way." Towards the conclusion of the same passage it is said: "And if an Act of Parliament gives "power to extinguish the public right, the private right will not "be affected thereby, but will continue to subsist," and in support of that proposition *Wells* v. *London, Tilbury and Southend Railway Co.*[1] is cited. At p. 130 of Pratt & Mackenzie, in dealing with extinguishment and diversion of highways, the editors point out, under "Effect of extinguishment, etc.": "If any private "rights of way existed over land before the dedication thereof to "the public, they are not affected by the extinguishment of the "public right."

In *Wells* v. *London, Tilbury and Southend Railway Co.*[1]: "The plaintiffs had been entitled from 1855 to a carriage-way to "property of theirs over a railway by a level crossing. By an "Act of Parliament obtained by the company in 1875, reciting "that it was expedient that the rights of way in respect of

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[1] 5 Ch.D. 126.

"certain footways which crossed the railway on the level should "be extinguished, it was enacted that all rights of way in, over, "or affecting the footways numbered 2, 4, 5, 6, and 7 on the "deposited plans should be extinguished. No provision for compensation was made. The roadway in question was numbered "5 on the deposited plans, and was thereon marked 'roadway "'and footway,' the others being marked simply 'footway'." It was held (affirming the decision of Malins V.-C.), "that upon "the true construction of the Act, it did not interfere with private "rights of way, but only with public rights of footway, and that "an injunction restraining the railway company from obstructing "the way had been rightly granted."

That case, being under a private Act of Parliament, is really perhaps not quite so useful for the purposes of this appeal as is *Allen* v. *Ormond*[2]: "One who has a grant of an occupation way "may declare in case against the owner of the land over which "the way leads for obstructing it, although it be proved that the "public in general had used the way without denial for the last "12 years." The decision of the court is stated in this way: "The court said, with respect to the first objection, that where "a party has a certain special right of way granted to him, he "may rest upon that title, and need not resort to a general right, "which may possibly be disputed by conflicting evidence; "especially in a case, like the present, of a public right of way "growing out of an occupation way."

An order made by quarter sessions for stopping up a highway under the provisions of the Highway Act, 1835, is an order made against the public. Section 91 provides that "the proceedings "thereupon shall be binding and conclusive on all persons "whomsoever." No one can dispute the proceedings, but that does not mean, it seems to me, that one who has a private right of way is thereby barred for all purposes from exercising that right of way. The order which is made is an order for stopping up a highway and it destroys the public right of way.

The judge had cited to him *Reg.* v. *Wallace*,[3] and, in particular, a portion of the judgment of Cockburn C.J.: "Upon "reference to the different sections of the Act, there appears "to be no foundation for this objection, for the simple reason "that as soon as the diversion to which the certificate of the "justices has reference is established, the old road ceases to "be a highway, and the land reverts, unencumbered by any

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[2] 8 East 4, 6.

[3] 4 Q.B.D. 641, 644.

"easement, to the original owners of the soil." It seems to me that the Lord Chief Justice in that case was dealing with the public rights or easements to which the old portion of the road had been subject up to the making of the order, and was saying that thereafter that portion of the highway was unencumbered by any of those easements. He had not in mind the position which arises in this case. I cannot see that upon the bald statement of fact and admission made to the judge in this case, it can be said that the plaintiff's case was destroyed merely by the fact that an order under the Highway Act, 1835, had been made stopping up this particular highway, qua highway.

I have said that I am anxious not to say anything about the facts of this case, but it must be clear that it remains to be decided whether or not the plaintiff establishes his case that Miss Lister's Road was, or was at some time, a private road, and it remains for him to establish, if he can, that before Miss Lister's Road became a highway some rights had accrued to him in respect of that which became Miss Lister's Road. Over and above that, the other issues raised by the pleadings are, of course, open, and in particular the defence of estoppel.

The order of this court should be that the case go back for rehearing before the county court judge.

DENNING L.J. It is clear law that there may be a private right of way along a road and a public right of way existing at the same time. When an order is made under the Act of 1835 stopping up a highway, that extinguishes the public right but does not affect the private right. This case must, therefore, go back for it to be determined whether there was, or is, such a private right.

ROMER L.J. I also agree. The Highway Act, 1835, was concerned, and concerned solely, with the rights of the public in relation to the use of highways, and was not concerned with private rights. I agree that this case should go back.

Appeal allowed; case remitted to the county court judge.

Solicitors: *Clutton, Moore & Lavington, for Ralph C. Yablon & Temple-Milnes, Bradford; W. H. Boocock & Son, Halifax.*

A. W. G.

REGINA *v.* CAMPBELL. *Ex parte* HOY.

1953
Feb. 23.

Lord Goddard C.J., Byrne and Gerrard JJ.

Justices—Practice—Plea of guilty—Conviction and sentence—Plea subsequently changed to "not guilty" by permission of magistrate—Remand for rehearing—Jurisdiction—Prohibition.

A woman charged with a customs offence elected to be tried summarily by a magistrate and pleaded "guilty." The magistrate convicted and passed a sentence of imprisonment. Subsequently on the same day, on the application of the woman's solicitor, the magistrate allowed the plea to be changed to "not guilty," and remanded the prisoner on bail. On an application by the prosecution for an order of prohibition to prohibit the magistrate from proceeding with the charge otherwise than by issuing a committal warrant:—

Held, that the magistrate having heard and determined the case and convicted was functa officio and had no power to allow the plea to be changed. In purporting to remand the prisoner on bail for the case to be reheard the magistrate had exceeded her jurisdiction and an order of prohibition would lie.

Rex v. *Manchester Justices; Ex parte Lever* [1937] 2 K.B. 96; 53 T.L.R. 687; [1937] 3 All E.R. 4 and *Rex* v. *Sheridan* [1937] 1 K.B. 223; 52 T.L.R. 626; [1936] 2 All E.R. 883 applied.

APPLICATION for an order of prohibition.

Mrs. Rose Lilian Lawford appeared at Tower Bridge Magistrates' Court on December 18, 1952, charged with knowingly harbouring certain uncustomed goods, to wit, 262 pairs of American nylon stockings with intent to defraud Her Majesty of the duties thereon, contrary to section 186 of the Customs Consolidation Act, 1876. The charge was preferred by Mr. Sidney Harold Hoy, an investigation officer of Customs and Excise, and the case was heard by Miss Sybil Campbell, a metropolitan magistrate.

It appeared from affidavits sworn by the deputy chief clerk of the court and by the solicitor for Customs and Excise, who had charge of the proceedings against the accused, that the accused, having been informed by the deputy chief clerk of the court that she had a right to be tried by a jury at London Sessions or by the magistrate, elected to be tried by the magistrate. The clerk then read the charge to the accused and asked her if she understood it. She replied that she understood it, and she pleaded guilty.

The solicitor on behalf of the prosecution then informed the magistrate that on December 10, 1952, police officers had called

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[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

at the accused's flat and found there two suitcases full of nylon stockings, apparently of American make. The accused had admitted that they had been smuggled, but said that they had been left in her flat by a man whose name and address she did not know.

The magistrate then heard the accused's evidence, said that she did not believe it, and imposed a sentence of four months' imprisonment.

Later on the same day a solicitor applied to the magistrate on behalf of Mrs. Lawford, and said that he was satisfied that, as a result of his instructions, she should not have pleaded guilty in the first instance. He accordingly applied to the magistrate to change the plea of guilty to a plea of not guilty. The magistrate acceded to the application and formally remanded Mrs. Lawford on bail so that the case could be heard before another magistrate.

On January 7, 1953, the case was called before Mr. H. W. Maddocks, and on behalf of the prosecution it was submitted that the case had already been heard and determined and that there was no jurisdiction to rehear it. Mr. Maddocks thereupon remanded Mrs. Lawford for a further period so that the submission could be considered by Miss Campbell. On January 30, when Mrs. Lawford again appeared before Miss Campbell, the submission was repeated and the magistrate was requested to sign a committal warrant. This she declined to do.

The prosecution thereupon, pursuant to leave of the Divisional Court, moved for an order of prohibition to prohibit Miss Campbell from further proceeding with the charge preferred against Mrs. Lawford otherwise than by issuing a committal warrant.

J. P. Ashworth and *R. J. Parker* for the applicant. In this case when the prisoner appeared before the magistrate the charge was read over to her and she said she understood it. She then pleaded guilty and was sentenced. She could not appeal against conviction because quarter sessions cannot entertain an appeal after a plea of guilty: *Rex* v. *West Kent Quarter Sessions Appeal Committee; Ex parte Files.*[1] The case would have been different if her plea had been accompanied by words which could be shown to indicate that she was really pleading not guilty: *Rex* v. *Durham Justices; Ex parte Laurent.*[2] Both those cases dealt with the rights of quarter sessions to entertain appeals, but the principle applies in this case because, if quarter sessions cannot entertain an appeal, equally the magistrate who has tried the case has no jurisdiction to reconsider it.

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[1] [1951] 2 T.L.R. 470; [1951] 2 All E.R. 728; [1951] W.N. 440.

[2] [1945] K.B. 33; 61 T.L.R. 73; [1944] 2 All E.R. 530.

[LORD GODDARD C.J. The question in this case is whether the magistrate was functa officio before the committal warrant was signed. If she was she could not change her decision. If she was not she could. Have you any authority on that?]

That is the case of *Rex* v. *Manchester Justices; Ex parte Lever*,[3] where justices convicted a man accused of motoring offences who did not appear before them. They passed a sentence of a fine, but before their decision had been entered in the register of the court they decided that the case should be heard in the man's presence. He was brought up before another bench and convicted, and a higher fine was imposed. On a rule nisi for certiorari to quash the latter conviction, it was held that the conviction was complete on the first occasion when the justices announced their decision, and the fact that it had not been entered in the register did not detract from the effectiveness of the conviction. It was also held that the man, having been convicted, was entitled to plead autrefois convict when charged a second time with the same offences: *per* Lord Hewart C.J.[4] and *per* Humphreys J.[5] The case of *Jones* v. *Williams*[6] was cited in argument. In that case justices convicted and fined a man, but shortly afterwards, having acquitted another man charged with the same offence, brought the first man back and acquitted him. It was held that the justices were not functi officio. That case was dealt with by Lord Hewart C.J., who said it did not apply, and Singleton J. said that the matter was concluded by *Rex* v. *Sheridan*.[7] Applying that authority to this case, the conviction was complete, and when the prisoner appeared before the second magistrate she could have pleaded autrefois convict.

The magistrate being functa officio when she heard the application made by the solicitor she had no power to accept his submission or to allow the plea to be changed and to direct that the case should be reheard before a second magistrate.

J. T. Mathew for the respondent, Miss Campbell. The solicitor for the prisoner made his application to the magistrate shortly after the hearing while she was still in court and while she was still seised of the matter. That being so the magistrate was not functa officio when she changed her mind as to the prisoner's guilt: *Jones* v. *Williams*.[8] If that submission is correct the magistrate quite properly allowed the plea to be changed and was entitled to direct that the case should be heard again before another magistrate. The first conviction would have been a nullity and when the prisoner came before the second magistrate the previous proceedings could have been struck from the register.

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[3] [1937] 2 K.B. 96; 53 T.L.R. 687; [1937] 3 All E.R. 4.

[4] [1937] 2 K.B. 101.

[5] Ibid.

[6] (1877) 36 L.T. 559.

[7] [1937] 1 K.B. 223; 52 T.L.R. 626; [1936] 2 All E.R. 883.

[BYRNE J. But it is pointed out in *Rex* v. *Manchester Justices*[9] that conviction does not depend on the register. If the prisoner had been able to prove to the second magistrate that she had been convicted already for the offence with which she was charged a second time she could have pleaded autrefois convict.]

This case is different from *Rex* v. *Manchester Justices*,[9] because in that case the only thing left to be done after the conviction was to enter it in the register. Here the committal warrant had still to be signed and the prisoner could not leave the court until that had been done.

[LORD GODDARD C.J. referred to the judgment of Charles J. in *Reg*. v. *Miles*,[10] cited by Humphreys J. in *Rex* v. *Manchester Justices*.[11] I do not see how she could ever have been tried again.]

She could not have been tried again if there had been a proper plea in the first instance. In my submission the whole of the first proceedings must be taken into consideration, which means that the submission made by the solicitor to the magistrate must be read into the plea. If as the result of that submission the magistrate was satisfied that the plea of guilty should not have been made, then a proper plea had not been entered. There would thus be a bar to a plea of autrefois convict at the second hearing.

[LORD GODDARD C.J. One knows that occasionally at assizes a man enters a plea of guilty and then after consultation with his counsel he withdraws his plea and pleads not guilty, but I have never known that happen after he has been brought up and sentenced.]

That happened in *Rex* v. *Blakemore*,[12] which was a case heard by Byrne J. at Warwick Assizes. Where a woman had pleaded guilty to a charge of receiving meat knowing it to be stolen counsel was instructed from the dock and he addressed the judge in mitigation. Before passing sentence the judge asked counsel whether he was satisfied that the accused knew that the offence involved knowledge that the property had been stolen. Counsel said he was satisfied that there had been a proper plea, but after sentence had been passed and after fresh instructions from the dock he asked the judge to allow the plea to be withdrawn and a plea of not guilty entered. Byrne J. said he thought the case was an exceptional one and he allowed the plea to be withdrawn on the grounds that the prisoner had not understood the ingredients of the charge. The sentence was annulled and the prisoner was tried again for the same offence before Finnemore J. and a jury at Birmingham, where she was convicted. That case points the principle of this whole matter.

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[8] 36 L.T. 559.

[9] [1937] 2 K.B. 96; 53 T.L.R. 687; [1937] 3 All E.R. 4.

[10] (1890) 24 Q.B.D. 423, 438; 6 T.L.R. 186.

[11] [1937] 2 K.B. 96; 53 T.L.R. 687; [1937] 3 All E.R. 4.

[12] (1948) 33 Cr.App.R. 49.

J. P. Ashworth replied.

LORD GODDARD C.J. Mrs. Lawford was brought before Miss Campbell and charged with an offence against section 186 of the Customs Consolidation Act, 1876. The evidence was, and it is undisputed, that the clerk of the court, while Miss Campbell was sitting, fully and carefully explained to the accused the nature of the charge. Thereupon she said: "What can I say. I have "nothing to say," and she pleaded guilty. Of that there is not the least doubt. Miss Campbell, a most experienced magistrate, heard her plead guilty and heard the explanation which had been given to the accused by the clerk of the court. If there had been any ambiguity in her plea, Miss Campbell would have entered a plea of not guilty, but this was a perfectly unambiguous, unequivocal plea of guilty, not like the pleas that are so often made, and as was the plea in *Rex* v. *Durham Justices*,[1] where a man was charged with receiving stolen property and in effect said: "Guilty "of receiving, but I did not know they were stolen," which amounted to a plea of not guilty. In this case, after a full explanation, the accused pleaded guilty. Thereupon, Miss Campbell passed a sentence of four months' imprisonment.

Later in the day a solicitor applied to Miss Campbell and said that in his opinion the woman ought not to have pleaded guilty. Miss Campbell said in her affidavit: "The solicitor making the "application on behalf of the said Rose Lilian Lawford is well "known to me and I have every reason to trust him. He said

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[1] [1945] K.B. 33; 61 T.L.R. 73; [1944] 2 All E.R. 530.

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"that he was satisfied as a result of his instructions that the said "Rose Lilian Lawford should not have pleaded guilty. I did not "know which of the facts stated by the prosecution were to be "put in issue and none of them had been proved. I concluded "that it was, to say the least, doubtful whether the said Rose "Lilian Lawford had fully understood the charge made against "her, notwithstanding the explanation given to her by the "deputy chief clerk, Mr. Hayward." Perhaps it would have been more satisfactory if some question had been put to the solicitor as to why his client desired to withdraw her plea, but, in any case, the court is of opinion that once the magistrate had convicted this woman she was functa officio, and she had no power to allow the plea to be changed.

This was an offence in respect of which the defendant had the right to go for trial by jury or could be tried, if she consented and if the prosecution consented, by the magistrate sitting as a court of summary jurisdiction. The magistrate's duties are entirely different in the one case from the other. If the prisoner elects to go for trial, or if the offence is one which must go for trial, or if it is one in which, until some of it has been heard, the magistrate has not made up his mind whether he will give the option of going for trial or not, he sits as an examining justice to take depositions and decide whether there is a prima facie case. But once jurisdiction is assumed to sit as a court of summary jurisdiction to hear and determine the case, the magistrate is sitting in exactly the same way as is a judge with a jury except, of course, that there is no jury; he hears and determines the case. When sitting as an examining justice, the magistrate does not hear and determine the case.

Having heard this case, the magistrate proceeded to determine it, the prisoner having pleaded guilty, by passing a sentence. A court of summary jurisdiction is not a court of record. There is a requirement that a minute is to be kept of decisions but, the case having been heard and determined by the magistrate, there was a conviction, and that woman could never be put on trial again for the same offence. A person who has once been convicted of an offence cannot be tried again for the same offence any more than a person who has been acquitted of an offence can be tried again after acquittal. There are certain exceptional cases in which a person can be put on trial a second time, but this is because, in the view of the law, the first trial has been a mistrial, that is to say, something had happened which prevented it being a trial at all so that the person had never been in peril. Such a case occurred some years ago, when a man was tried at quarter sessions before a deputy recorder who did not have the necessary qualifications, and who therefore had had no jurisdiction to try the case. The prisoner was never in peril. That was held to be a mistrial, and the man was retried. Generally speaking, a person cannot be retried once there has been a conviction or an acquittal, and the old pleas in bar were called autrefois convict and autrefois acquit.

In this case, Miss Campbell, having heard this application by the solicitor, had the prisoner brought back again, admitted her to bail, and directed that the case should be heard before another magistrate. There is no question that since *Rex* v. *Manchester Justices*,[2] if under those circumstances the prisoner had been brought before another magistrate, that that magistrate could have been prevented from hearing the case by the prisoner saying: "I have already been convicted; I was not only convicted, I was "sentenced." The fact that the magistrate announces in court that there is a conviction amounts to a conviction. That was laid down in this court in the well-known case of *Rex* v. *Sheridan*.[3] In that case a prisoner, having been given the option, elected to be tried by the magistrates, who, having completed the case, announced that they had convicted, but they did not pass sentence. Thereupon, the prisoner's record was placed before the magistrates, who, taking the view that it was a case in which their powers of punishment were not adequate, purported to recall the conviction and said that they committed him for trial. When the case was called at quarter sessions counsel for the prisoner pleaded autrefois convict, and it was held that there was no answer to that plea; the prisoner had been convicted by a court of competent jurisdiction, namely, the magistrates who, under the Summary Jurisdiction Acts, had power to try the case, and the fact that the bench of magistrates had announced that they had convicted the prisoner had amounted to a conviction. As Humphreys J. said in *Rex* v. *Manchester Justices*[4]: "I find it "difficult to treat seriously the argument that a statement by "justices, who are a court of competent jurisdiction, that a person "who has been tried before them is guilty of the offence charged "against him does not constitute a conviction until a clerk has "made a record of the finding of the magistrates in a register

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[2] [1937] 2 K.B. 96; 53 T.L.R. 687; [1937] 3 All E.R. 4.

[3] [1937] 1 K.B. 223; 52 T.L.R. 626; [1936] 2 All E.R. 883.

[4] [1937] 2 K.B. 96, 101.

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"which the court is required to keep." If the magistrate announces a conviction, there is a conviction.

It seems to me that if we give effect to the argument which has been quite properly addressed to us by Mr. Mathew and uphold what the magistrate did in this particular case, many curious consequences might follow. Suppose that this matter had gone on, and had come before another magistrate, and the solicitor had said to the woman: "I think that we are in difficulties here because this magistrate is known to take very serious "views in customs cases and his sentences are generally six "months; you only got four months before Miss Campbell." Could the solicitor then have made the plea of autrefois convict? If he had done so I do not see what the answer would have been. Equally, supposing that point had not been taken and the second magistrate had given a sentence of six months instead of four months, would there have been a remedy for the woman? I think that the court would say that the second conviction was a nullity because she had already been convicted by the first magistrate.

Technically the plea of autrefois convict or autrefois acquit is a plea which is pleaded in the superior courts as a matter of record, and it amounts to saying that a person cannot be brought before the magistrate a second time. In fact, as Charles J. said in *Reg.* v. *Miles* [5]: "I think the proceedings were a bar apart "from any statutory provision, and that the conviction should be "quashed in accordance with the well-established rule at common "law—that where a person has been convicted for an offence by "a court of competent jurisdiction, the conviction is a bar to all "further criminal proceedings for the same offence. This rule "has been acted on again and again, and I can see no reason why "it should not be acted on in this case."

In the present case, therefore, if the magistrate convicted the woman on her own confession and passed sentence, she could never be brought before any other court charged with that offence. I think, therefore, that Miss Campbell, in purporting to remand this woman on bail so that she might be brought before another magistrate, exceeded her jurisdiction, and that the only thing left for her to do, and that it was her duty to do, having pronounced sentence, was to make out a warrant of commitment. Then, when the sentence had been duly passed, the woman had a right to appeal to quarter sessions against the sentence. She could

[5] 24 Q.B.D. 423, 438; 6 T.L.R. 186.

not appeal against conviction because the statute does not give a right to appeal against conviction where there has been a plea of guilty. I can well understand, and I have a certain sympathy with, the view that the magistrate took in this case, but the court has to apply well-settled principles of law and not make law to fit the hardship of any particular case. So far as the conviction is concerned, it seems to me that the only remedy the prisoner has, if she has any real grievance or if she had any real defence, is to apply for the prerogative of mercy to be used, but she can go to quarter sessions and appeal against the sentence.

Having given the fullest consideration I can to this case, it seems to me that *Rex* v. *Manchester Justices* [6] is binding on this court. It was a different case in some respects, but the ratio decidendi is obviously applicable here, and the court cannot depart from it without reversing and overruling that case, which we are not prepared to do. I think that that case was rightly decided. That case and *Rex* v. *Sheridan* [7] prevents the court from interfering in this case, and therefore the order of prohibition must lie.

BYRNE J. I have every sympathy with the view taken by Miss Campbell, but I agree with my Lord that the two cases of *Rex* v. *Sheridan* [7] and *Rex* v. *Manchester Justices* [8] are conclusive and completely cover the matter which has been argued before this court.

GERRARD J. I agree, and have nothing I can usefully add.

Application granted.

Solicitors: *Solicitor, Customs and Excise; Hawker & Wheatley.*

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[6] [1937] 2 K.B. 96.

[7] [1937] 1 K.B. 223.

[8] [1937] 2 K.B. 96.

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Feb. 24, 25,
26, 27.

Byrne J.

COOTE *v.* EASTERN GAS BOARD.

[1949 C. 4062.]

Gas—Nationalization—Limitation of action—Action against gas board for breach of statutory duty by predecessors—Whether six years' or three years' limitation—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 2 (1)—*Gas Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 67), *ss.* 14 (2), 17 (1), (5).

Between 1937 and 1948, the plaintiff was employed by a gas company as a stoker in the company's vertical retort house. In 1945 the plaintiff had difficulty in breathing and subsequently developed bronchitis and emphysema and ceased to be employed as a stoker. By section 17 (1) of the Gas Act, 1948, all rights, liabilities and obligations of gas undertakings were, as from the vesting date (May 1, 1949) vested in area gas boards. On October 14, 1949, the plaintiff issued a writ against the defendant gas board, claiming damages for injury and loss alleged to have been sustained by him as a result of a breach by the company of their statutory duty in having failed to make suitable provision for adequate ventilation of the retort house or to have taken all practical measures to protect him against inhalation of dust or fume or other impurity. The defendants contended that, the action having been commenced more than three years from the cause of action in 1945, was barred by section 14 (2) of the Gas Act, 1948:—

Held, that the effect of section 17 (5) of the Act of 1948 was that the board took over the rights and liabilities of the company subject to the six years' limitation of action under section 2 (1) of the Limitation Act, 1939, and it was only in respect of acts done by the board in its own name that it could claim the protection of the three years' limitation under section 14 (2) of the Act of 1948, and that, therefore, the action was not statute barred.

ACTION.

The plaintiff was employed by the defendants, the Eastern Gas Board, who, by virtue of the Gas Act, 1948, were the statutory successors of the Luton Gas Company. The plaintiff entered the employment of the company in 1919, and in 1937 became a stoker in the vertical retort house of the company where, apart from a period of some 13 months, he worked until 1948. The retort house was 128 ft. long and 73 ft. high, with a jack roof running two-thirds of the length of the building. During the war, owing to black-out regulations, canvas was placed over the jack roof at night, but there was a nine-inch gap through which fumes and dust could escape. In addition, up to 1943 there was a tower fitted with wooden louvres which were not covered at any time. Although during the war there had been complaints of excessive heat at night due to the restricted ventilation, there was no evidence of any complaints with regard to the accumulation of gas and dust such as to be injurious to persons in the gas works.

In 1945 the plaintiff found that he had difficulty in breathing, and in 1948 he was admitted to hospital suffering from bronchitis and emphysema. In that year he ceased to be a stoker and became a slot meter collector at a reduced wage.

On October 14, 1949, the plaintiff issued a writ against the defendant board alleging that the conditions in which he had to work during the war caused or aggravated his illness and were also a breach by the company of sections 4 (1) and 47 (1) of the Factories Act, 1937. The board denied that they were in breach of either of those sections, and further contended that the cause of action accrued in 1945, and that the action was statute barred by virtue of section 14 (2) of the Gas Act, 1948, by which the period of six years' limitation of action under the Limitation Act, 1939, s. 2 (1), was reduced to three years in the case of actions against an area board.

Stephen Chapman for the plaintiff. Section 14 (2) of the Gas Act, 1948, was plainly dealing with acts or omissions of a gas board when carrying out its functions under the Act, and it was only in respect of proceedings against the board for such acts or omissions that the three-year period of limitation applied. Here proceedings were only brought against the board as successors of the Luton Gas Company for acts done by the company. This was very different to acts done by the board itself after the vesting date.

The position of a gas board as successor to an undertaking was dealt with by section 17 (5)[1] of the Act of 1948. That subsection meant that, as from the vesting date, a gas board took over all the liabilities of an undertaking. If it was suggested that the provisions of section 14 (2) should be imported into section 17 (5) it would mean that where a person had a cause of action against a gas undertaking, say, three years and six months before the vesting date, on the vesting date his right of action would immediately cease. If this had been the intention of section 17 (5) plain words would have been used to indicate it. In *Alcock* v. *Eastern Electricity Board*, an unreported decision of Stable J., at Norwich Assizes in 1950, the same question arose under the Electricity Act, 1947, section 12 and section 14 (7) of which contain similar provisions to section 14 and section 17 (5) respectively of the Act of 1948. In that case Stable J. held that an action against an electricity board in respect of a tort alleged to have been committed by an undertaker was not statute barred after three years from the date of the cause of action. It is submitted that that case is on all fours with the present, and that the plaintiff here is not statute barred.

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[1] Gas Act, 1948, s. 17 (5): "Without prejudice to the generality of the "preceding provisions of this section, "where any right, liability, or obligation vests by virtue of this Act, "the appropriate board and all other "persons shall, as from the vesting "date, have the same rights, powers "and remedies (and in particular "the same rights as to the taking or "resisting of legal proceedings or the "making or resisting of applications "to any authority) for ascertaining, "perfecting or enforcing that right, "liability or obligation as they would "have had if it had at all times been "a right, liability or obligation of the "board, and any legal proceedings or "applications to any authority pending on the vesting date by or against "the undertaker, in so far as they relate to any property, right, liability "or obligation vested by virtue of this "Act or to any agreement or document which has effect in accordance "with subsection (3) or subsection (4) "of this section or to any enactment "applied by or under this Act, shall "be continued by or against the "appropriate board to the exclusion of "the undertaker."

G. G. Baker Q.C. and *Sir Shirley Worthington-Evans* for the Eastern Gas Board. The six-year period available to the Luton Gas Company under section 2 (1) of the Limitation Act, 1939, was automatically reduced on the vesting date to a three-year period which ran from the date on which the cause of action accrued. In the present case the cause of action accrued, if at all, when damage resulted from the alleged breach of statutory duty. Such breach ended on the termination of the black-out restrictions in 1945, and as the writ was not issued until 1949 the plaintiff was statute barred.

Byrne J. [after stating the facts:] By section 17 (1) of the Gas Act, 1948, all property, rights, liabilities and obligations of the Luton Gas Company vested in an area gas board as from the vesting date (May 1, 1949). Section 17 (5) of the Act provides: [His Lordship read it].

I take that subsection to mean that if a gas board takes over the liabilities of a private undertaking (as was the case here) it does so subject to the six years' limitation of action under section 2 (1) of the Limitation Act, 1939. As from the vesting date, however, any act done by a gas board in its own name is protected after three years by virtue of the provisions of section 14 (2) of the Act of 1948. If the subsection does not mean that, it would be producing a state of injustice, because one can well

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envisage a case in which a person, before the vesting date, was within the six years' limit for bringing an action against the company, and then, the vesting date having arrived, the right of action which had existed disappeared, so to speak, overnight because the six years had been reduced to three. I do not read this section as meaning that such an injustice should be effected, and I hold, therefore, so far as this aspect of the case is concerned, that the action is not statute barred.

[His Lordship proceeded to consider whether there was a breach of statutory duty by the company, and continued:] Having regard to all the evidence I am satisfied that the plaintiff has not established that the company were in breach of either section 4 (1) or section 47 (1) of the Factories Act, 1937, and, in those circumstances, there must be judgment for the defendants.

Judgment for the defendants.

Solicitors: *L. Bingham & Co.; Barlow, Lyde & Gilbert.*

J. D. P.

BROOM *v.* MORGAN.

[1951 B. No. 3707.]

C. A.

1953
Mar. 5, 6.

Singleton, Denning and Hodson L.JJ.

Husband and Wife — Tort — Negligence — Personal injuries — Wife injured by husband's negligence in course of his employment— Liability of husband's employer — Vicarious liability — Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 12—*Law Reform (Married Women and Tortfeasors) Act,* 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *ss.* 1, 5, *Sch.*

The plaintiff and her husband were employed by the defendant, who was the licensee of a public-house, the husband as manager of the house and the wife as his helper. Owing to the negligence of the husband, in the course of his employment as manager, the wife sustained injuries. She sued the defendant, as employer of herself and her husband, and was awarded damages by the trial judge against the defendant. The defendant appealed, contending that as the husband could not in law commit a tort against his wife, and she could not sue him for negligence, and the responsibility of the employer being a vicarious one, an action by the wife against the employer would not lie.

Held, that, since the passing of the Married Women's Property Act, 1882, it was clear that a husband could be guilty of a tortious act towards his wife, although she could not sue him therefor; that

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the liability of the employer was based on the maxim, qui facit per alium facit per se; and that, the negligent act complained of having been done in the course of the husband's employment, the claim of the wife would lie.

Per Singleton L.J.: The fact that a wife has no right of action against her husband in respect of his tortious act and negligence does not mean in law that she has no right of action against her husband's employers if he, when he did that negligent act, or made that negligent omission, was acting within the scope of his employment. They remain liable, and there is no reason either in law or in common sense why they should be given an immunity which springs, in the case of husband and wife, from the fiction that they are one, and from the desire that litigation between husband and wife shall not be encouraged.

Per Denning L.J.: I am aware that the employer's liability for the acts of his servants has often been said to be a vicarious liability, but I do not so regard it. The master is not liable when a servant does something "on a frolic of his own." He is only liable when the servant is acting in the course of his employment. The reason for the master's liability is the sound moral reason, that the servant is doing the master's business, and it is the duty of the master to see that his business is properly and carefully done. He takes the benefit of the work when it is carefully done, and he must take the liability of it when it is negligently done. If the servant is immune from an action at the suit of the injured party owing to some rule of law, nevertheless the master is not thereby absolved. The master's liability is his own liability and remains on him notwithstanding the immunity of the servant.

Decision of Lord Goddard C.J. [1952] W.N. 531; [1952] 2 T.L.R. 904; [1952] 2 All E.R. 1007, affirmed.

APPEAL from Lord Goddard C.J.

The defendant, Mrs. Lilian Alice Joan Morgan, who was the tenant of a beer and wine house called the "Bird in Hand," West End Lane, Hampstead, employed the plaintiff, Mrs. Phyllis Muriel Broom, and the husband of the plaintiff, to manage the house for about three months. The husband was expressed to be the manager, and he and the plaintiff were to live on the premises and to give their whole time to the business. The plaintiff in fact helped to serve in the bar during the evenings and prepared light refreshments during the day.

On February 4, 1950, a few days after taking over, the plaintiff, having passed through a small doorway leading to and from the bar, fell through an open trap-door immediately inside it, by means of which bottles were passed up to the bar, and sustained injuries. No steps had been taken to protect a lift shaft which the trap-door covered.

The plaintiff alleged that the defendant was responsible for her (the plaintiff's) husband's negligence in leaving the trap-door open and unprotected, and failing to give the plaintiff warning of the danger. The defendant contended that as the tort alleged was that of a husband towards his wife, for which the wife could not have sued him, the defendant, as employer, could not be made vicariously liable.

On November 17, 1952, Lord Goddard C.J. gave judgment for the plaintiff and awarded her £367 5s. 0d. damages. He said that the doctrine of vicarious liability had now become firmly established in English law, although there was some confusion as to the true reason for it. The decisions in *Hern* v. *Nichols*,[1] *Wayland's* case,[2] and *Bartonshill Coal Co.* v. *Reid*[3] showed, in his opinion, that although it was common to speak of the master's liability as vicarious, it was none the less regarded as the liability of the principal. The master was just as much liable as though he had committed the tort himself, because the servant's act was his act.

The defendant appealed.

John Thompson for the defendant. It is conceded that in some cases the master, as employer, is said to be acting through his servant, but true vicarious responsibility depends on the liability of the servant. The theory that in law the employer is acting by his own hand does not apply in all cases, otherwise common employment would not have been a defence where the responsibility is that of the master although the act was that of the servant. Vicarious responsibility and initial liability are two different branches of liability. If it is merely vicarious responsibility a pre-condition is that there must be liability on the part of the actor—in this case the husband—who must have been under a duty not to act negligently quoad his wife. A husband owes no duty, imposed and recognized by law, not to cause injury to his wife by negligence. The wife is unable to bring an action for damages in respect of negligence by the husband. Even if he hit her on the head she would have no remedy in tort against him, though she could charge him with assault. There being no cause of action known to the law there is no tort. "Tort" signifies an actionable wrong. What the husband did quoad the wife was not an actionable wrong and therefore there was nothing for which the defendant employer was liable in law. The question for decision is whether there is any liability in the husband which the master is called upon by the law to answer. The decision of Charles J. in *Smith* v. *Moss and Another* [4] has no bearing on this case.

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[1] (1701) 1 Salk. 289.

[2] (1706) 3 Salk. 234.

[3] (1858) 3 Macq. 266.

[Singleton L.J. I should have thought that the manager of an hotel owed a duty of care at least to every person employed under him, which in this case included his wife.]

My proposition is that you cannot be a tortfeasor and yet not be liable to a suit. Both Charles J. and the Lord Chief Justice held that a wife cannot sue her husband for a tort. In *Phillips* v. *Barnet* [5] it was held that a wife could not sue her husband, after the marriage had been dissolved, for a tort committed during the marriage. The reason is that a husband cannot commit a tort on the wife.

[Hodson L.J. Section 12 of the Married Women's Property Act, 1882, as amended, says that no husband or wife can sue the other for tort, which assumes that there can be a tort.]

The criterion of tort is the right to bring an action as a remedy: see *Rex* v. *Creamer*.[6] The basis of the rule is the unity of spouses. It is not a mere procedural rule. If the liability of the employer is based on the fact that the husband was an agent, then it follows that the person who is employed, the husband, must be liable to the injured wife, or the employer will not be liable. The ratio of the decision in *Smith* v. *Moss* [7] was *Phillips* v. *Barnet*.[8] The reasoning and ratio of Charles J. was wrong, and Lord Goddard C.J., having approved the decision of Charles J., was also in error.

A. P. Marshall Q.C. and *F. G. Paterson* for the plaintiff. It is contended for the defendant that quoad his wife a husband cannot be negligent, or, put in another way, that unless there is a remedy there is in fact no tort. That is a wrong approach to the issue. In substance, counsel for the defendant has to argue here that the husband, in any circumstances, over the whole realm of tortious responsibility, owes no duty to his wife. That is a startling and thoroughly unsound proposition. With reckless courage my friend has endeavoured to define a tort. No satisfactory definition is to be found in the textbooks of Pollock, Salmond or Winfield, though there are certain recognized features.

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[4] [1940] 1 K.B. 424; 56 T.L.R. 305; [1940] 1 All E.R. 469.

[5] (1876) 1 Q.B.D. 436.

[6] [1919] 1 K.B. 564.

[7] [1940] 1 K.B. 424.

[8] 1 Q.B.D. 436.

[SINGLETON L.J. It is clear beyond dispute that there is a moral duty owed by the husband, and I suspect there is also a legal duty. Why is there a legal duty if there is no remedy?]

The law takes away the remedy, but the duty still remains. There is a common law duty by a husband to take care towards his wife. Tort has certain qualities. It is a civil wrong, it is a breach of duty owed to persons generally and not to particular persons. That being so, and if the duty is a general one to people who are brought within the sphere of duty, is it to be suggested that because the wife cannot sue her husband it is not a duty owed to her? The position of husband and wife has been altered by the Married Women's Property Act, 1882, and the fiction that they are one can no longer be said to exist. The inability to sue one another, which has been preserved, has been retained for other reasons than the fiction of unity. Sir Percy Winfield in his textbook on the Law of Torts, 5th ed., p. 100, hints at the disappearance of that fiction. It is submitted that the law of torts is not a law which exculpates a husband from any general duty owed to a body of persons, including his wife. The fiction proceeded on the procedural difficulty that a wife could not sue separately, but only with her husband. The fiction of unity was intended to justify the procedure. In deciding this case it is only necessary to look at the Act of 1882, as amended, the fiction being no longer recognized. The duty remains but the remedy has gone.

It is not really the action of the husband on which the liability of the master is based. The true position is this: the vicarious liability exists over the whole area of master and servant, but there is in certain areas a liability which the master has to face under the law. In those areas it matters not by whom the duty has been broken, but only whether it has been broken. The present case is based upon the principle of an implied command, by which the act becomes the act of the employer, and therefore the legal position of the servant is completely irrelevant. The liability may be joint and several, but it springs up by reason of an implied command, so that in law the act complained of becomes the act of the employer. On that ground the plaintiff is entitled to sue and maintain her action against the employer.

Thompson in reply.

SINGLETON L.J. Mrs. Morgan made an agreement which is dated January 2, 1950, with Mr. and Mrs. Broom under which the husband and wife were to be employed, and were employed,

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as manager and as a helper in the licensed house. The second recital in the agreement is: "Whereas . . . it is intended that "the manager shall be appointed the resident manager of the "said 'Bird in Hand' beer and wine house for and on behalf "of the employer for a period of three calendar months from "January 20, 1950." The agreement sets out the employment of husband and wife. They were paid £7 a week between them, and the evidence shows that the husband paid £3 of that to his wife, the plaintiff in the action.

[His Lordship stated the facts and continued:] Mrs. Broom brought an action against the defendant, the licensee of the public-house, who was her employer and the employer of her husband, and in that action she claimed damages which she said occurred through the negligence of the defendant, her servant or agent, and she set out how the accident happened, claiming that the trap-door was left open through negligence on the part of the defendant's servant or agent. She did not mention that the servant or agent was her husband, and there followed an application for particulars of the servant or agent, from which it appears, and it is common ground, that the person who was said to be negligent was her husband.

[His Lordship considered the course of the trial below, and said that it was not now open to the defendant to say that the husband was not negligent. His Lordship continued:] I now come to the important point. The position with regard to an employer was stated by Lord Goddard C.J., in the course of his judgment, from a passage in the opinion of Lord Cranworth in the first of the *Bartonshill Coal Co.* cases, *Bartonshill Coal Co.* v. *Reid.*[1] I prefer to read a passage from the judgment of Lord Chelmsford L.C. in the second case—that is, *Bartonshill Coal Co.* v. *McGuire.*[2] Lord Chelmsford said: "It has long been the established law of this "country that a master is liable to third persons for any injury "or damage done through the negligence or unskilfulness of a "servant acting in his master's employ. The reason of this is, "that every act which is done by a servant in the course of his "duty is regarded as done by his master's orders, and "consequently is the same as if it were the master's own act, "according to the maxim, Qui facit per alium facit per se." It is clear that when the manager, the husband of the plaintiff, was in the course of his duty getting bottled beer from downstairs

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[1] 3 Macq. 266, 283.

[2] 3 Macq. 300, 306.

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through the trap-door he was acting in the course of his duty; in doing that he left the trap-door open without warning anyone as to the danger which was thereby created.

It is said that that was negligence on his part, and that he was negligent vis-à-vis the plaintiff, his wife. There is no liability for negligence unless there is in the particular case a legal duty to take care. Where there is a duty to take care, reasonable care must be taken to avoid acts or omissions which it can reasonably be foreseen would be likely to injure persons who are reasonably likely to be affected. Among the persons reasonably likely to be affected by an act such as that which is complained of in this case are the persons employed upon the premises, who might be likely to go into the place at which a danger is created. There were at least two persons employed; one was the manager and another was the plaintiff. It seems to me that in those circumstances the manager of the licensed house, who left the trap-door open, can be said to have failed to use reasonable care to avoid an act which he could reasonably have foreseen would be likely to injure a person working on those premises. His wife was one of those persons.

Lord Goddard C.J., in giving judgment for the plaintiff, followed a decision of Charles J. in *Smith* v. *Moss*,[3] and he cited a judgment to the like effect of Cardozo C.J. in the New York Court of Appeals—*Schubert* v. *Schubert Wagon Co.*[4]

The defendant appeals against the judgment of Lord Goddard, and Mr. Thompson's submission on her behalf can be expressed quite shortly: a husband cannot be negligent vis-à-vis his wife; and, in a case of vicarious responsibility, an action can only succeed against the employer if an action would have succeeded against the employee who was negligent. The liability, he said, of employers and negligent employees was a joint and several liability, and unless an action against the employee would succeed, an action against the employer in respect of that employee's negligence must fail. I think that that expresses the submission which Mr. Thompson made, and it was supported by citations from a number of authorities, though, strange to say, the precise position which arose in this case does not appear to have been before the Court of Appeal previously. The only reported case in this country, indeed, was the decision of Charles J. which I have mentioned.[5]

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[3] [1940] 1 K.B. 424; 56 T.L.R. 305; [1940] 1 All E.R. 469.

[4] (1929) 249 N.Y.Reports 253.

[5] [1940] 1 K.B. 424.

It seems to me that, in approaching this subject, one must look first to see what the duty of the husband, the manager, was to his wife. He owed a duty to other employees on the premises. His wife was one of them. Mr. Thompson submitted that he was under no legal duty to his wife at all, and was under no duty to take care. I find that difficult to follow. At common law a husband was under a duty to maintain his wife, and I should think that there must be upon the husband a duty not to injure her by carelessness or by neglect, and by "neglect" I mean by breach of some duty. I cannot think that the husband was under no legal duty to his wife. If she was an employee under him, his duty to her was the same as his duty to any other employee. It is right to say that if he failed in the duty which he owed to her as an employee, she could not succeed in an action against him in respect of that breach of duty or negligence, for a wife cannot sue her husband in tort; but that is not the same as saying that he cannot be guilty of a breach of duty towards her.

The Married Women's Property Act, 1882, s. 12 (as amended), provides: "Every woman, whether married before or "after this Act, shall have in her own name against all persons "whomsoever, including her husband, the same civil remedies, "and also (subject, as regards her husband, to the proviso herein-"after contained) the same remedies and redress by way of "criminal proceedings, for the protection and security of her "own property, as if she were a feme sole, but, except as "aforesaid, no husband or wife shall be entitled to sue the other "for a tort." The natural reading of that is that there can be a tort as between husband and wife, but neither husband nor wife is entitled to sue the other for a tort.

Mr. Marshall put forward two or three comparatively simple propositions. He began by saying that law on this matter depended on duty, and he asked this court to say that the husband was under a duty of care towards his wife—to say to the contrary would be going in the face of history. He submitted there was a duty at common law to take care. He drew attention to the fact that it had been said that the position of a husband and wife, and in particular the fiction that husband and wife were one, was altered by the Married Women's Property Act, 1882, and he cited to us one or two decisions to which I shall have to refer. In the last edition, the fifth edition, of Sir Percy Winfield's textbook on the Law of Tort, at p. 100, in the paragraph which is entitled "Actions between spouses," there appears this passage: "Actions "in tort between husband and wife were not possible at common "law owing to the fiction that they were one flesh; a better and "more modern reason is that such litigation is 'unseemly, distressing and embittering.'"

It is said, on the one hand, that because an action between husband and wife in respect of a tort cannot succeed, therefore this action against the employer of the negligent husband by another employee, the wife, must fail. I do not think that that follows, and the reason why it does not follow is set out very clearly in *Waugh* v. *Waugh*.[6] The headnote to that case states: "A wife may "maintain an action for a tort committed by her husband as agent "for a third party." The Chief Justice of New South Wales gave the first judgment, but perhaps I may take a passage from Maxwell J.'s judgment first to show how the action came about.[6] "The plaintiff, a Mrs. Waugh, was a passenger in a car driven "by her husband and owned by their son. She was injured in "an accident due—as it was alleged and found—to the negligence "of her husband in the driving of the car. A verdict was found "in her favour and she recovered damages in the District Court "for personal injury. The defendant appeals to this court and "seeks to have the verdict set aside and judgment entered for "the defendant. The sole question which arises is whether in "view of the relationship between the plaintiff and the driver "(her husband) the action lies against the defendant."

The Court of Appeal of New South Wales held that the plaintiff was entitled to succeed. The Chief Justice, after agreeing with the reasons given by Maxwell J., said [7]: "The undoubted "position in law is that, except for the protection of her own "property, a wife cannot sue her husband in tort, and on the "facts of the present case the plaintiff could not claim against "her husband for the injuries which she sustained as the result "of his negligent driving. But the action is brought by the "plaintiff, not against her husband as the driver of the car, but "against the owner for whom he was acting at the time as the "servant or agent and who would be responsible for any negligence of the driver while acting within the scope of his "authority, and I can find no reason for extending the special "immunity of the driver from liability so as to cover that driver's "principal."

Maxwell J., in the course of his judgment, referred to a number of decisions, and in particular to the judgment of Cardozo C.J.

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[6] (1950) 50 S.R.N.S.W. 210, 212.

[7] Ibid. 211.

which I have mentioned already. He said: "An American decision "is to the same effect: see *Schubert* v. *Schubert Wagon Co.*[8] The "facts were that the plaintiff while in the highway was struck by "the defendant's car and injured. The car causing the hurt was "driven by the plaintiff's husband, who was then in the defendant's service. His negligence was not disputed. It was conceded "that the employer would have been liable if the servant, the "driver of the car, had been a stranger to the plaintiff. The question was whether the rule of liability is different where the "servant is the husband. Cardozo C.J. delivering the judgment "concurred in by six other justices of the court, said: 'An "'employer commits a trespass by the hand of his servant upon "'the person of another. The act, let it be assumed, is within the "'scope either of an express mandate or of an implied one. In "'either event, if the trespass is not justified, he is brought under "'a distinct and independent liability, a liability all his own. The "'statement sometimes made that it is derivative and secondary "'(*Pangburn* v. *Buick Motor Co.*[9]) means this and nothing more, "'that at times the fault of the actor will fix the quality of the "'act. Illegality established, liability ensues. The defendant, "'to make out a defense, is thus driven to maintain that the "'act, however negligent, was none the less lawful because "'committed by a husband upon the person of his wife. This "'is to pervert the meaning and effect of the disability that "'has its origin in marital identity. A trespass, negligent or "'wilful, upon the person of a wife, does not cease to be an "'unlawful act though the law exempts the husband from liability "'for the damage. Others may not hide behind the skirts of "'his immunity. The trespass may be a crime for which even "'a husband may be punished, but whether criminal or not, "'unlawful it remains. As well one might argue that an employer "'commanding a husband to commit battery on a wife, might "'justify the command by the victim's disability. The employer "'must answer for the damage whether there is a trespass by "'direct command or trespass incidental to the business committed to the servant's keeping. In each case the maxim "'governs that he who acts through another, acts by himself.'" The judge held that the appeal failed, with which Owen J. agreed.

The judgment of the Chief Justice of New South Wales and those of Maxwell J. and Owen J., if I may humbly say so, commend themselves to me, and I agree with them.

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[8] (1929) 249 N.Y.Reports 253, 256–7.

[9] (1914) 211 N.Y.Reports 228.

Mr. Marshall referred to the decision of the Ontario Court of Appeal in *White* v. *Proctor*,[10] which is to the like effect, though it is not quite so helpful because of the particular terms of the statute which applied in that case.

I base my judgment in this matter upon this short consideration: the fact that a wife has no right of action against her husband in respect of his tortious act, and negligence, does not mean in law that she has no right of action against her husband's employers if he, when he did that negligent act, or made that negligent omission, was acting within the scope of his employment. They remain liable, and there is no reason, either in law or in common sense, why they should be given an immunity which springs in the case of husband and wife from the fiction that they are one, and from the desire that litigation between husband and wife shall not be encouraged.

During the course of the argument, I considered what the effect of a decision the other way would be. An omnibus belonging to the London Transport Executive might be negligently driven upon the foot-walk, seriously injuring 10 people, one of whom was perchance the wife of the driver. If actions were brought against the London Transport Executive is it to be said that the nine can recover, but the one cannot recover merely because she is the wife of the driver? That is not the law of this country.

I am satisfied that this appeal ought to be dismissed.

DENNING L.J. It is said by Mr. Thompson that the liability of the employer is only a vicarious liability—that is to say, that it is a substituted liability whereby a person who is not morally answerable is made responsible for the liability of another, and it cannot exist if that other is not liable.

I am aware that the employer's liability for the acts of his servants has often been said to be a vicarious liability, but I do not so regard it. The law has known cases of a true vicarious liability; for instance, in the old days when a wife uttered slanders at a tea party with her friends, the husband was answerable for her wrongdoing, although it was no concern of his. I do not regard the liability of master and servant as coming into this category. The master is not liable when a servant does something "on a frolic of his own." He is liable only when the servant is acting in the course of his employment. The reason for the master's liability is not the mere economic reason that the employer usually has money and the servant has not. It is the sound moral reason that the servant is doing the master's business, and it is the duty of the master to see that his business is properly and carefully done. Take the case of a master who sends a lorry out on to the road with his servant in charge. He is morally responsible for seeing that the lorry does not run down people on the pavement. The master cannot wash his hands of it by saying, "I put a competent driver in charge of "the lorry," or by saying, "It was only the driver's wife who "was hurt." It is his lorry, and it is his business that it is on. He takes the benefit of the work when it is carefully done, and he must take the liability of it when it is negligently done. He is himself under a duty to see that care is exercised in the driving of the lorry on his business. If the driver is negligent there is a breach of duty not only by the driver himself, but also by the master.

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[10] (1937) Ontario 647.

In support of this view I would observe that the master and the servant are held in law to be joint tortfeasors. Either or both of them can be made liable for the negligence with which the work was done. If I might quote a passage from my judgment in *Jones* v. *Manchester Corporation* [11]: "When a master employs "a servant to do something for him, he is responsible for the "servant's conduct as if it were his own. If the servant commits "a tort in the course of his employment, then the master is a "tortfeasor as well as the servant. The master is never treated "as an innocent party," and I gave my reasons.

It was argued by Mr. Thompson that the doctrine of common employment afforded a legal recognition of vicarious liability. That argument was put in this way,—There are two spheres of liability on an employer—namely, liability for breach of duty in the employer's sphere (which is a primary liability), and liability for casual negligence by a servant (which is a vicarious liability). The employer was able to rely on common employment as a defence to his vicarious liability, but not as to his primary liability. Hence the doctrine of common employment implicitly recognized that there was a sphere of vicarious liability on an employer.

I do not think that that argument is sound. The doctrine of common employment was an irrational exception to the liability of an employer. It was based not on any theory

[11] [1952] 2 Q.B. 852, 870; [1952] 1 T.L.R. 1589; [1952] 2 All E.R. 125.

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of vicarious liability, but on a fictitious implied contract. It has now been abolished by statute, and should be disregarded in the same way as if it had never been enunciated. Statute law and common law should be integrated as one law. It would be a retrograde step to call up the doctrine of common employment from the past so as to build upon it a theory of vicarious liability, especially when it is remembered that in the *Bartonshill* cases,[12] which established the doctrine, the House of Lords expressly held that the liability of a master was based on the principle that the servant's act was his act. One may describe it as a vicarious act, if one pleases, but not as a vicarious liability.

My conclusion on this part of the case is, therefore, that the master's liability for the negligence of his servant is not a vicarious liability but a liability of the master himself owing to his failure to have seen that his work was properly and carefully done. If the servant is immune from an action at the suit of the injured party owing to some positive rule of law, nevertheless the master is not thereby absolved. The master's liability is his own liability and remains on him notwithstanding the immunity of the servant.

If I am wrong about this, however, and the liability of the master is, properly speaking, a vicarious liability only (so that he is only liable if his servant is also liable), then I still think that the employer here is liable. It is plain, to my mind, that the husband owed a duty to everyone lawfully in the house to use reasonable care, and that he was negligent so far as all of them were concerned, including his wife. If the barman fell down the hole and was injured, the husband would clearly be guilty of a tort and be liable for the damage. So he is when his wife falls down the hole. The only difference is that by statute she is not permitted to sue him for it. His immunity does not rest on the theory that husband and wife are one. That fiction has no longer any place in our law. His immunity nowadays rests simply on the wording of section 12 of the Married Women's Property Act, 1882, which is preserved in this respect by section 1 of the Act of 1935. That section disables the wife from suing her husband for a tort in much the same way as the Statute of Frauds prevents a party from suing on a contract which is not in writing; but it does not alter the fact that the husband has been guilty of a tort. His immunity is a mere rule of procedure and not a rule of substantive law. It is an immunity from suit and not an immunity from duty or liability. He is liable to his wife, though his liability is not enforceable by action; and, as he is liable, so also is his employer, but with this difference, that the employer's liability is enforceable by action.

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[12] 3 Macq. 266.

I ought to say a word about *Phillips* v. *Barnet.*[13] That case was decided in 1876 before the Married Women's Property Act, 1882. In so far as it was based on the fiction that husband and wife were one, the reasoning is no longer valid; but I would not like to suggest that the case would be decided any differently today. The immunity from suit conferred by section 12, once it has attached, is not lost by divorce. A wife who has divorced her husband for cruelty by blows cannot afterwards sue him for damages for assault.

I agree that the appeal should be dismissed.

Hodson L.J. The question in this case is whether the plaintiff can maintain an action against her husband's master in respect of an injury suffered owing to the act of her husband, acting in the course of his employment. It is conceded that if the act of the husband had been such an act as to identify him with the master in the doing of the act, so as to make applicable in its literal sense the maxim qui facit per alium facit per se, the action would have lain against the master once negligence had been proved. It is contended, however, that this is not such a case. The act of negligence is said to be (as it were) outside the master's sphere and to be the servant's independent act even though done in the course of his employment. It is said to be an act of a kind to which the doctrine of common employment would previously have applied, and so the argument runs as follows: a wife cannot sue her husband in tort; therefore a husband owes no duty to his wife not to injure her by his careless act; accordingly, since no duty exists, the employer cannot be responsible for breach of any duty.

Much reliance was placed on *Phillips* v. *Barnet*,[13] which was also referred to by Lord Goddard C.J. in the judgment under appeal. The headnote reads: "A wife after being divorced from "her husband cannot sue him for an assault committed upon her "during coverture. Declaration, that the defendant assaulted "and beat the plaintiff. Plea, that at the time of the committing "of the grievances, etc., the plaintiff was the wife of the "defendant. Replication, that before suit the marriage of the

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[13] (1876) 1 Q.B.D. 436.

"plaintiff and the defendant was dissolved by the absolute decree "of the Court for Divorce and Matrimonial Causes. On "demurrer:—*Held*, that the replication was bad; for that the "action did not lie, as the wife's inability to sue did not arise "merely from the necessity of joining her husband in an action "for an assault, but from the rule that husband and wife are one "person in law."

Mr. Thompson relied on that case partly as showing that the disability of the wife was not merely procedural, because if it had been only procedural there would have been no obstacle to the plaintiff, in the events which had happened. It is true that the reason given for the decision in that case was that husband and wife were taken to be one, but although no one would, I imagine, question the validity of the decision, it might be justified on broader grounds of public policy, such as those indicated in the judgment of McCardie J. in *Gottliffe* v. *Edelston*,[14] referred to in the passage in Professor Winfield's book on the Law of Tort, to which my Lord has referred.

I think that the reasoning behind the argument put forward by Mr. Thompson is fallacious. It is quite true that the wife cannot sue her husband in tort, and that this position is expressly preserved by the Married Women's Property Act of 1882, s. 12, but the language of the section presupposes the existence of the tort. Moreover, as was pointed out in *White* v. *Proctor*,[15] the decision in *Phillips* v. *Barnet*[16] was before the Married Women's Property Act in England, which has made great inroads upon the principle of unity of husband and wife. In the opinion of the judge who delivered the judgment of the Court of Appeal: "The Married Women's Property Acts in England and here have "brought about a radical change in the status of married women, "and modern thought has borne at least an equal part. I "question if the old fiction of law that husband and wife are in "law one person has much place in modern jurisprudence."

It might be said, having regard only to the language of section 12 of the Married Women's Property Act, 1882, that the disability is merely procedural, but I think that it goes further and that it is also a substantive disability based on public policy. The rule subsists, but that does not, in my opinion, involve the proposition that a husband is not in breach of duty to his wife if

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[14] [1930] 2 K.B. 378, 392; 46 T.L.R. 544.

[15] (1937) Ontario 647, 651.

[16] 1 Q.B.D. 436.

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he injures her by his careless act. It is that stage in the argument of Mr. Thompson which I feel myself unable to accept. It is true that an action in tort is not available to her, and that there is an exception to the general rule which gives a right to damages where a tort is proved. Immunity is given to the husband personally, but the immunity does not extend to the master, and the master who is vicariously responsible cannot shelter behind the servant. That is the conclusion in substance which has been reached in all the cases, so far as we have been informed by counsel, after their researches in the matter. These cases include decisions of Dominion courts and courts of the United States of America, and in particular I would respectfully notice the powerful authority of Cardozo C.J. sitting in the Court of Appeal in New York with six other judges, which was referred to by the Lord Chief Justice in his judgment.

I think, therefore, that on principle and authority the defendant is liable to the plaintiff for the act of her servant. The expression "vicarious liability" or, perhaps more accurately, vicarious act, is, in my opinion, apt to cover all cases whether the act is in the master's sphere or not—that is to say, whether he is also liable directly or liable merely through the servant, he is liable vicariously for the negligent act of the servant done in the course of his employment. That this is a proper conclusion to be reached is supported by the language of both the Lord Chancellors in the two *Bartonshill* cases,[17] put shortly and clearly in the passage from Lord Chelmsford's speech which my Lord has read.

I agree that the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Gascoin & Co.; R. I. Lewis & Co.*

A. W. G.

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[17] 3 Macq. 300, 306.

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Lord Goddard C.J., Croom-Johnson and Pearson JJ.

Criminal Law—Corrective training—Followed by imprisonment for another offence—Undesirability—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21.

If at the time when a prisoner is serving a sentence of corrective training there are other offences outstanding against him, it is undesirable that a sentence of imprisonment should be passed in respect of the latter offences to take effect at the conclusion of the sentence of corrective training.

CASE referred by the Secretary of State under section 19 (*a*) of the Criminal Appeal Act, 1907.[1]

The prisoner, Derek Talbot, a man of bad character, was convicted at Burnley quarter sessions on March 31, 1952, of shop-breaking and larceny and was sentenced to three years' corrective training under section 21 of the Criminal Justice Act, 1948.[2] There were at that time two other offences outstanding against him; one charge was for driving while disqualified from holding a driving licence contrary to the Road Traffic Act, 1930, s. 7 (4),[3] and the other was for using a driving licence, that of his brother, with intent to deceive, contrary to section 112 (1)[4]

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

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[1] Criminal Appeal Act, 1907, s. 19: ". . . the Secretary of State ". . . may . . . (*a*) refer the whole "case to the Court of Criminal "Appeal, and the case shall then be "heard and determined by the Court "of Criminal Appeal as in the case "of an appeal by a person con"victed. . . ."

[2] Criminal Justice Act, 1948, s. 21 (1): "Where a person who is "not less than 21 years of age—(*a*) is "convicted on indictment of an "offence punishable with imprison"ment for a term of two years or "more; and (*b*) has been convicted "on at least two previous occasions "since he attained the age of 17 of "offences punishable on indictment "with such a sentence, then, . . . "the court may pass, in lieu of any "other sentence, a sentence of correc"tive training for such term of not "less than two nor more than four "years as the court may determine."

[3] Road Traffic Act, 1930, s. 7 (4): ". . . if any . . . person while he is ". . . disqualified [from holding or "obtaining a licence] drives a motor "vehicle, . . . on a ~~road;~~ that person "shall be liable on summary convic"tion to imprisonment for a term not "exceeding six months or if the court "think that, having regard to the "special circumstances of the case, a "fine would be an adequate punish"ment for the offence, to a fine not "exceeding fifty pounds, or to both ". . ."

[4] Road Traffic Act, 1930, s. 112 (1): "If, with intent to deceive, any "person—(*a*) . . . uses . . . a licence "under any Part of this Act . . . he "shall be guilty of a misdemeanour "and shall be liable—(i) on conviction "on indictment to imprisonment for a "term not exceeding two years; . . ."

of that Act. On April 22, 1952, at Sheffield quarter sessions, Talbot was convicted of both offences and received two sentences of six months' imprisonment to run concurrently and to take effect when he had served the sentence of corrective training.

The prisoner petitioned the Secretary of State asking that the sentences of imprisonment be altered to sentences of corrective training, and the Secretary of State referred the case to the Court of Criminal Appeal.

Michael Havers for the prisoner. On the authority of *Rex* v. *Meaney*[5] a sentence of imprisonment should not follow one of corrective training.

[LORD GODDARD C.J. In *Rex* v. *Meaney*[5] we said that if a man is in corrective training it cannot be right to sentence him to a term of imprisonment to follow that of corrective training; but there is a further complication, for in *Rex* v. *Heritage*[6] the court laid down that it was undesirable for a term of imprisonment to run concurrently with one of corrective training.]

In this case the sentence of six months should run concurrently with the corrective training.

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[5] An unreported decision of the Court of Criminal Appeal (Lord Goddard C.J., Humphreys and Jones JJ.) dated March 27, 1950, in which Lord Goddard C.J., giving the judgment of the court, said: "This man was "sentenced in July, 1949, at Lancaster quarter sessions, to two years' "corrective training. The notices "had been properly served on him "there. He was then, a few days "afterwards, brought up at Cambridgeshire quarter sessions on "another charge which had not been "taken into account at Lancaster, "and no notices under the Criminal "Justice Act had been served so that "the court could not sentence him to "corrective training because proper "steps had not been taken. The "court then sentenced him to two "years' imprisonment to follow the "two years' corrective training. "That, of course, would be an unfortunate state of affairs, because it "would do away with such benefit as "he received from corrective training, "and the prisoner put in a very "proper notice of appeal in which he "said: 'As the sentence I received "'at Lancaster is considered to be of "'a corrective nature, and a last "'opportunity I have of rehabilitating myself before being sentenced "'to preventive detention, I feel "'therefore that the sentence of two "'years' imprisonment following the "'corrective training period would be "'in a nature of destroying what "'benefits I had obtained from corrective training.' I think that it "would, and not only that, under the "corrective training sentence he will "be under supervision when he is "released; but as no notices were "served in the Cambridgeshire case "we could not even make a supervision order under section 22 of the "Act.

"The court feels that, in the circumstances, the only thing they can "do is to alter the sentence which "was passed at Cambridge so as to "make it concurrent with the sentence of corrective training. . . ."

[6] (1951) 35 Cr.App.R. 45; [1951] 1 All E.R. 1013.

J. F. Drabble for the Crown. This case is different from *Rex* v. *Meaney* [7] because there it was a sentence of two years' imprisonment to follow two years' corrective training.

It is only by virtue of the second charge being added to the indictment that it could be suggested that the prisoner should be sentenced to corrective training at all.

In respect of the first charge the statute says that a man "shall be liable . . . to imprisonment for a term not exceeding "six months" unless the court think that having regard to the special circumstances a fine would be appropriate. This special rule under section 7 (4) has not been derogated from in the general rule in the Criminal Justice Act, 1948.

LORD GODDARD C.J., delivering the judgment of the court, stated the facts and continued: This case throws into strong relief the difficulties which arise from the new sentences created by Parliament by the Criminal Justice Act, 1948. In providing that in certain circumstances corrective training can be imposed, instead of imprisonment, certain conditions precedent are required to be performed, such as giving notice of intent to prove previous convictions and matters of that sort. [His Lordship read section 21 (1) of the Act of 1948 and continued:] It follows that a person cannot be sentenced to corrective training for driving when disqualified because that is not an offence punishable with two years' imprisonment on indictment, but he can be sentenced to corrective training for using a driving licence with intent to deceive. He can, however, only be sentenced to corrective training for that offence if the appropriate notices have been served and it is shown that he is a person with the necessary previous convictions.

This court has already said that, where a person has been sentenced to corrective training, it appears to them to be undesirable that the sentence should be followed with a sentence of imprisonment for another offence. Corrective training is a substitute for imprisonment to this extent, that the prisoner serves his sentence in prisons specially set aside. The discipline is different and attempts are made to teach the man a trade or inculcate habits of discipline and regularity. The discipline is different from that received by a prisoner undergoing an ordinary sentence of imprisonment. Different considerations apply with regard to what is to happen to him when his sentence is ended.

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[7] Ante, 614.

No orders are made under section 22 of the Criminal Justice Act. There are automatic consequences which follow—I say "automatic" because they are laid down in a Schedule to the Act—and the prisoner becomes liable to the provisions of the Schedule as soon as he is discharged. He is under different conditions of after care and so forth.

Now what is to be done? The recorder had to pass a sentence of imprisonment for driving when disqualified, and he thought, quite rightly, that the offence of using the driving licence with intent to deceive also deserved a sentence, but, as the notices had not been served, he could not sentence the prisoner to corrective training. If the notices had been served, I think that the recorder could have increased the sentence of corrective training from three years to four years by passing another sentence of two years' corrective training to take effect from the period during which the prisoner was serving corrective training, which would have kept him in corrective training for the maximum period of four years instead of three years. It is only fair to the prisoner to say that that is what he asks should be done, but it cannot be done because of these various steps which have to be taken, but were not taken.

The court has more than once expressed the hope that, when this Act of 1948 comes to be amended, as it no doubt will, for various difficulties are seen to arise, something will be done with regard to sentences of corrective training, which are only given in the hope that they may be of benefit to the prisoner, and that courts will not be hampered quite in the same way in which they are now in giving these sentences. If we could do it, we think that this would be a very proper case in which to say that the sentence of corrective training should be increased from three years, as originally passed at Burnley, to four years, so that the extra year would be served for the offences dealt with at Sheffield. But, as I have said, the court cannot do that, and as we think, and have said on a previous occasion [*Rex* v. *Meaney* [1]], that it is undesirable to pass a sentence the effect of which would be that a person would cease to do corrective training and go into imprisonment when he had earned remission or had completed his sentence of corrective training, the court feels that the only course that they can take is to say that the sentence passed by the recorder of Sheffield—on which we are not making the smallest reflection, in fact we agree with

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[1] Ante, 614.

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that sentence—will have to be concurrent with the sentence of corrective training, and that in the result the whole sentence must be served in corrective training, so that the concurrent sentences of imprisonment really have no effect. It is unfortunate, but that seems to be the only result to which we can come on the wording of the Act of 1948.

As we think that under the Act of 1907 we are entitled to treat this case as one in which the prisoner has appealed against sentence—in fact he petitioned the Home Secretary, who has referred the case to us—we can pass a disqualification from holding a licence to drive a motor vehicle.

[The court considered the matter and disqualified the prisoner for seven years from the date of his conviction—April 22, 1952.]

Sentences varied accordingly.

Solicitors: *Registrar, Court of Criminal Appeal; Town Clerk, Sheffield.*

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[1951 H. 2576.]

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Jan. 13, 14, 15, 16, 19, 20.

Slade J.

Building—"Scaffold"—Boards on roof for workman to stand on—Duty to provide—Warning notice—Fragile roof—Risk of falling on adjoining roof—Whether working "above" it—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *regs.* 3, 5, 31 (3) (*a*) (*b*).

Damages—Personal injuries—Workman's life materially shortened—Damages not to include wages which, but for the accident, would have been earned during natural life.

The plaintiff, while working for the defendants on the drip edge of a flat roof fell on to an adjoining sloping roof, about two feet below, made of asbestos. The asbestos broke and he fell more than 10 feet to the ground and was seriously injured, his expectation of life being materially shortened. He claimed damages from the defendants, alleging that they were in breach of their common law duty to him to provide a safe system of working, and in breach of their statutory duty under regulations 5 and 31 (3) (*a*) of the Building (Safety, Health and Welfare) Regulations, 1948, to provide scaffold and other plant, and under regulation 31 (3) (*b*) to display warning notices, and the point was taken for the plaintiff that, on the authority of *Roach* v. *Yates* [1938] 1 K.B. 256, the damages to which he was entitled should include a sum in respect of the wages which he would have received during his normal working life had it not been shortened by the accident:—

Held, first, that the risk of the plaintiff falling through the asbestos roof was one which the defendants could and should have foreseen, and that in failing to take such precautions as would guard him from falling they had failed in their duty to provide a safe system of working and were guilty of negligence at common law.

Smith v. *Baker & Sons* [1891] A.C. 325, and *Wilsons and Clyde Coal Co. Ld.* v. *English* [1938] A.C. 57, applied.

Held, secondly, that had boards been placed on the asbestos roof for the plaintiff to stand on to perform his work they would have constituted a "scaffold" within the definition in regulation 3 of the Building Regulations, and in failing to provide such boards for that purpose the defendants were in breach of regulation 5.

The defendants not having displayed any notice that the roof was fragile, were also in breach of regulation 31 (3) (*b*), but inasmuch as the plaintiff knew that it was fragile that breach had no bearing on the accident and his claim failed so far as that regulation was concerned. There was no breach of regulation 31 (3) (*a*) since the defendant was not working "above" in the sense of "higher in the vertical plane of" the asbestos roof.

Held, lastly, that in assessing damages no sum could be allowed in respect of loss of wages between the anticipated date of the plaintiff's death due to shortened expectation of life and the date to which he would normally have lived but for the accident. The statement of principle to the contrary in the headnote to *Roach* v. *Yates* [1938] 1 K.B. 256 ([1937] 3 All E.R. 442) was not borne out by the judgments in that case. The only relevance of such earnings was that they were an element for consideration in assessing damages for loss of expectation of life, in the sense that a person earning a reasonable livelihood was more likely to have an enjoyable life.

Phillips v. *London and South-Western Railway Co.* (1879) 5 Q.B.D. 78 and *Rose* v. *Ford* [1937] A.C. 826 considered.

ACTION.

On November 24, 1950, the plaintiff, an asphalt spreader, employed by the defendants, was chipping old asphalt from the vertical drip edge, about eight-and-a-half inches wide, of a flat roof, 13 to 15 feet above the ground, preparatory to replacing it with new asphalt. The plaintiff was performing the work by kneeling on the flat roof about 9 inches from the edge when he either overbalanced or slipped whilst changing his position and fell on to an adjoining sloping roof about two feet below, which rose at an angle of about 30 degrees to a central ridge and was covered with asbestos. That roof broke and the plaintiff fell through it more than 10 feet on to the floor below and sustained serious injuries. The Building (Safety, Health and Welfare) Regulations, 1948, were admittedly applicable to the work the plaintiff was doing.

The method of working adopted by the plaintiff was the normal one for such work, but it could have been performed by standing on boards placed on the sloping roof. The plaintiff was aware that the roof below him was fragile, but he did not ask for planks to be placed upon it or for anything to catch him in case he fell. The defendants' foreman was aware of the nature of the asbestos roof, but no safety devices were provided, nor were there any notices stating that the roof was fragile.

At the time of the accident the plaintiff was 35 years of age, and had always enjoyed good health. As a result of the accident his spine was fractured and, among other things, the lower portion of his body became paralysed, and his expectation of life was materially reduced, medical reports estimating it at between six months and two years from the date of the trial of the action (between two-and-a-half to four years from the date of the accident). Since the accident all his time had been spent in hospital and he had undergone two operations; he had suffered, and would continue to suffer, great pain and discomfort, and he would require nursing and attention for the remainder of his life.

The plaintiff claimed damages from the defendants, alleging that his injuries were caused by their failure to comply with the provisions of regulation 31 (3) (*a*) and (*b*),[1] or, alternatively, of regulation 5[2] of the Building (Safety, Health and Welfare) Regulations, 1948. He further alleged that the defendants were guilty of negligence at common law in that, inter alia, they negligently adopted an unsafe system of working.

The defendants denied breach of statutory duty and negligence, and alleged that the plaintiff's injuries were solely caused, or contributed to, by his own negligence.

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[1] Building (Safety, Health and Welfare) Regulations, 1948, reg. 31 (3): "Where work is being done on "or near roofs . . . covered with "fragile materials through which a "person is liable to fall a distance of "more than 10 feet—(*a*) where work-"men have to pass over or work "above such fragile materials, suit-"able and sufficient ladders, duck "ladders or crawling boards, which "shall be securely supported, shall be "provided and used; (*b*) prominent "notices stating that the coverings "are fragile shall be affixed at the "approaches thereto."

[2] Building (Safety, Health and Welfare) Regulations, reg. 5: "Suit-"able and sufficient scaffolds shall be "provided for all work that cannot "safely be done on or from the "ground or from part of the building, "or from part of a permanent struc-"ture or from a ladder or other avail-"able means of support. . . ."

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For the plaintiff the point was taken, on the authority of *Roach* v. *Yates*,[3] that the damages to which he was entitled included damages in respect of loss of the wages which he would have earned during his natural life had it not been shortened by the accident.

J. R. Crichton Q.C. and *Leonard Lewis* for the plaintiff. There was here a clear breach by the defendants of the common law duty owed by an employer to his employee. The defendants' duty to the plaintiff was to take reasonable care to provide proper appliances for his safety and to take reasonable care not to subject him to any unnecessary risk. The risk, and the plaintiff's fall, was unnecessary because it could have been obviated by the provision of some safety device, in particular by placing boards across the sloping roof. Had such boards been provided the plaintiff could have stood on them and done the work in safety, or, had he done the work by kneeling on the upper roof the boards would have prevented him, if he fell, from falling more than a few feet. Furthermore, the danger of a workman kneeling only a few inches from a drop of from 13 to 15 feet, even when a fragile roof is interposed between him and the ground, is obvious. The accident which happened was one which any reasonable employer could and should have foreseen.

Regulation 3 of the Building (Safety, Health and Welfare) Regulations, 1948, defines a "scaffold" as "any temporary "structure on or from which persons perform work" and as including "any working platform." The work which the plaintiff was performing could have been done from boards placed on the sloping roof; the failure to provide such boards was a failure to provide a scaffold within the meaning of regulation 5. The plaintiff was working above a roof covered with fragile material through which he was liable to fall more than 10 feet within the meaning of regulation 31 (3). The defendants' failure to provide any of the equipment mentioned in regulation 31 (3) (*a*) was a breach of that regulation, and their failure to affix any notice stating that the covering was fragile was a breach of regulation 31 (3) (*b*). It is immaterial that the plaintiff knew that this particular roof was covered with asbestos; knowledge does not necessarily mean that a particular fact is in the forefront of the mind, and a notice would have reminded the plaintiff and drawn his attention to the roof. The onus is on the defendants to show that the accident was not due to their breach of duty. [*Vyner* v. *Waldenberg Brothers Ld.*[4] referred to.]

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[3] [1938] 1 K.B. 256; [1937] 3 All E.R. 442.

The plaintiff is entitled to substantial damages. Damages for pain and suffering should not be reduced because the pain and suffering will only be endured for a short time. The total damages awarded should include, as a separate head of damage awarded in addition to, not as part of, damages for loss of expectation of life, a sum in respect of the future wages which, but for the accident, the plaintiff would have earned during his normal expectation of life. The defendants must make restitutio in integrum and compensation should be assessed on the basis that the plaintiff has prima facie lost 20 years of working life; the fact that he is going to die within two years should not affect his right to compensation for the loss of earning and working life. That proposition emerges clearly from *Roach* v. *Yates*[5]; it is summarized in item (ii) in the headnote and is supported, in particular, by the judgment of Slesser L.J.

Greer and Mackinnon L.JJ. had the views of Slesser L.J. in their minds; Greer L.J. seems to have accepted the basis of an annuity as a proper basis of compensation, and the figure awarded was the sum which, as he said,[6] "independently, each "member of this court thinks is a proper sum to award in this "case." At the time of *Roach* v. *Yates*[7] there was considerable unemployment and more hazards of life than at the present time; if not in compensation for loss of future wages it is difficult to see what did make up the total sum awarded. Damages for pain and suffering were limited to six months, the special damages were not very great, and damages for loss of expectation of life were small; the total sum awarded, therefore, must have included an amount in respect of loss of future wages.

There is ample authority for the view of Slesser L.J. in *Roach* v. *Yates*,[8] and his judgment is founded on *Phillips* v. *London & South-Western Railway Co.*[9] In that case Field J., summing up, told the jury that, while not giving the plaintiff a capital sum by way of an annuity of his average earnings for the rest of his life, they must give a general sum to compensate for the loss of wages during the remaining years of his normal life, and he referred to[10] "the fairest estimate you can make of what the "probable continuance of the plaintiff's professional income

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[4] [1946] K.B. 50; 61 T.L.R. 545; [1945] 2 All E.R. 547.

[5] [1938] 1 K.B. 256.

[6] [1938] 1 K.B. 256, 267.

[7] Ibid.

[8] [1938] 1 K.B. 256.

[9] (1879) 5 Q.B.D. 78.

[10] Ibid. 81, 82.

"would have been"; he also told the jury to take into account the contingencies of a normal life and not a shortened one. James L.J., referring to the summing up, said [11]: "That comes "to this, you are to consider what his income would probably "have been, how long that income would probably have "lasted. . . ." In *Phillips* v. *London & South-Western Railway Co.*[12] the plaintiff was faced with a "speedy death"; there is, therefore, a similarity between that case and this. [*Rowley* v. *London & North-Western Railway Co.*[13] referred to.]

Beney Q.C. and *J. L. Elson Rees* for the defendants. The common law duty of an employer towards his employee as defined by Lord Herschell in *Smith* v. *Baker & Sons Ld.*[14] is fulfilled by the exercise of due care and skill: see the remarks of Lord Wright in *Wilsons and Clyde Coal Co. Ld.* v. *English.*[15] The employer must exercise common sense, but in the light of his own and others' experience. It was the universal practice to adopt the method of work adopted by the plaintiff; experience had shown it to be the right method, in which no untoward incident had occurred, and the defendants, in adopting that method, exercised due care and skill. The court must look at the situation as it was before the accident, and not ex post facto: see the remarks of Lord Thankerton in *Glasgow Corporation* v. *Muir.*[16] Had the asbestos roof not been there so that there was a possibility of dizziness it is not disputed that the method adopted would not have been the proper method and that a scaffold should have been provided, but that was not the case. It is submitted that the danger of the plaintiff falling, which did not occur to anyone, not even to the plaintiff himself, would not have occurred to the hypothetical reasonable employer and that no reasonable employer would have envisaged the necessity of providing safety belts or nets or other devices. The test in point here is that laid down by Lord Dunedin in *Morton* v. *William Dixon Ld.*,[17] cited by Lord Normand in *Paris* v. *Stepney Borough Council.*[18] The matter must be looked at from a practical point of view, and the onus is on the plaintiff to satisfy the court that the defendants neglected to foresee an obvious risk and to take the precautions commonly taken by others in like circumstances. [*Bolton* v. *Stone*[19] referred to.]

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[11] 5 Q.B.D. 78, 87.

[12] Ibid. 87.

[13] (1873) L.R. 8 Ex. 221.

[14] [1891] A.C. 325, 362; 7 T.L.R. 679.

[15] [1938] A.C. 57, 79; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[16] [1943] A.C. 448, 454, 455; 59 T.L.R. 266; [1943] 2 All E.R. 44.

[17] 1909 S.C. 807, 809.

[18] [1951] A.C. 367, 382; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

The complaint made is not that the system of work adopted was unsafe but, in reality, that nothing was provided to catch the plaintiff if he fell. The failure to provide boards on the asbestos roof is not a breach of the Building Regulations; regulation 5 is directed to a scaffold and a safe access, and is concerned with preventing a fall, not with catching a man if he does fall; that is borne out by a comparison with other regulations, e.g., regulations 77, 95 or 97. A scaffold is something from which the work is performed, and as the purpose of the boards would have been to catch the plaintiff if he fell, they would not have been a scaffold within the meaning of the regulation and the plaintiff's fall was not due to a breach of it.

Regulation 31 (3) is also concerned with preventing a fall, but it is submitted that the plaintiff was not "working above" a fragile roof within the meaning of the regulation. "Above" must mean vertically above. Regulation 31 (3) (*b*) is supplementary to 31 (3) (*a*) and is intended to apply to the situation where a workman has to traverse a fragile roof to get to his work. It is submitted that the regulation does not apply to this case. Even if the regulation does apply, the plaintiff knew that the roof was fragile and a notice under regulation 31 (3) (*b*) would only have told him what he knew already. It is not known how the accident occurred, and if there was any breach of statutory duty it has not been shown that it had any bearing on the accident. *Watts* v. *Enfield Rolling Mills*[20] shows that *Vyner* v. *Waldenberg Brothers Ld.*[21] can be pushed too far.

[On the issue of contributory negligence they referred to *Caswell* v. *Powell Duffryn Associated Collieries Ld.*,[22] *Norris* v. *Syndic Manufacturing Co. Ld.*,[23] and the Building (Safety, Health and Welfare) Regulations, reg. 4.]

In *Flint* v. *Lovell*[24] it was said that a diminished expectation of life was an element properly to be considered when estimating damages because, in a sense, the right to live had been lost, but the proposition that the value of earnings which the plaintiff might have received during his natural life had it not been shortened are also an element of damage opens too wide a field. If such earnings were to be taken into account it would be relevant also to consider whether the plaintiff, had he lived for his normal expectation of life, might have inherited a fortune, or married an heiress, or started a successful business; conversely, he might have lost his job or become bankrupt. Such damage would be impossible to assess, and those points were in mind in *Rose* v. *Ford*.[25] In that case it was not urged that the plaintiff was entitled to damages for loss of future wages, but Lord Wright said[26]: "The moment before the girl died there was, as I think, "apart from her actual death a cause of action vested in her for "deprivation or loss of expectation of life. Before the Act [the "Law Reform (Miscellaneous Provisions) Act, 1934] that cause "of action would have ceased with her death." Both Lord Wright and Lord Roche were clearly against including loss of earnings in damages, and Lord Atkin expressed no concluded opinion. He said[27]: "I am of opinion, therefore, that a living "person can claim damages for loss of expectation of life. "If he can, I think that right is vested in him in life, and "on his death passes under the Act of 1934 to his personal "representative. I do not see any reason why the fact that the "expectation is realized, i.e., that death comes at the time "anticipated or sooner, should make any difference. How the "damages are to be calculated is a question which this House "has not to decide, for there has been no quarrel with the amount "fixed by the Court of Appeal in this case of £1,000."

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[19] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.

[20] [1952] 1 T.L.R. 733; [1952] 1 All E.R. 1013.

[21] [1946] K.B. 50.

[22] [1940] A.C. 152, 178; 55 T.L.R. 1004; [1939] 3 All E.R. 722.

[23] [1952] 2 Q.B. 135; [1952] 1 T.L.R. 858; [1952] 1 All E.R. 935.

[24] [1935] 1 K.B. 354; 51 T.L.R. 127.

Lord Greer, in *Roach* v. *Yates*,[28] was not dealing with loss of earnings due to loss of life, and it is not clear whether such earnings were taken into account in that case; the amounts awarded would indicate that they were not. The only possible support for the plaintiff's contention is in the judgment of Slesser L.J., but it does not appear from that judgment that damages should include damages in respect of future wages. *Phillips* v. *London & South-Western Railway Co.*[29] is of no help on this point. In *Benham* v. *Gambling*[30] Viscount Simon said[31]: "The damages are in respect of loss of life, not of loss "of future pecuniary prospects." The plaintiff's contention embodies a novel proposition; if it be right in law it is remarkable that it has not been discussed in the authorities, and it is submitted that the damages to which the plaintiff is entitled should not include damages for loss of future wages.

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[25] [1937] A.C. 826; 53 T.L.R. 873; [1937] 3 All E.R. 359.

[26] [1937] A.C. 826, 845.

[27] Ibid. 834.

[28] [1938] 1 K.B. 256.

[29] 5 Q.B.D. 78.

[30] [1941] A.C. 157; 57 T.L.R. 177; [1941] 1 All E.R. 7.

[31] [1941] A.C. 157, 167.

Gerrard Q.C. and *Stephen Chapman* for the third parties. The words "Loss or gain to his estate consequent upon . . . "death" in section 1 (2) (*c*) of the Law Reform (Miscellaneous Provisions) Act, 1934, suggest that, in regard to damages, the matter should be considered after death. There is no case in which damages have been assessed in the manner the plaintiff contends that they should be assessed in this case, and it has never been suggested that a claim should include an item in respect of the possible earnings of a deceased person throughout his normal working life. To award damages on such a basis would not be justified because if the plaintiff were alive to earn the wages he would have to support himself out of them. It is submitted that *Benham* v. *Gambling*[32] and *Rose* v. *Ford*[33] are conclusive on this question.

There was no reason to suppose that the plaintiff was likely to fall, particularly in view of his experience. It was not an accident which would have been envisaged by a reasonable man; the plaintiff himself knew that the roof was fragile and there was nothing left undone that should have been done. It is submitted that there was no breach of common law duty.

The obligations imposed by regulation 5 indicate that it applies where work cannot safely be done from part of a building; it is not applicable in this case because the work could safely be done from the roof. If, from the common law point of view, the roof was not a safe place in that dangers were likely to occur there, then the first part of regulation 5 applied. It has not been suggested that a scaffold as a working place or a gangway as a means of access should have been erected; the obligation under the regulation is to provide a scaffold, but that was not the appropriate precaution. [*Walker* v. *Bletchley Flettons Ld.*[34] referred to.] There was no breach of regulation 31 (3) (*b*) because the place where the plaintiff was working was not part of an approach.

Crichton Q.C. in reply. In *Benham* v. *Gambling*[35] and *Rose* v. *Ford*[36] the damages awarded for loss of expectation of life were small; damages for loss of future wages are a separate head of damage and quite distinct from damages for loss of expectation of life. Admittedly the plaintiff would have had to spend some of the money which he would have earned to keep himself, but he had a right to spend the money, and to have earned the money to spend, and he might have enjoyed what he got for it.

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[32] [1941] A.C. 157.

[33] [1937] A.C. 826.

[34] [1937] 1 All E.R. 170.

[35] [1941] A.C. 157.

[36] [1937] A.C. 826.

SLADE J. stated the facts and continued: The breaches of common law duty alleged, with one exception, are substantially a repetition of the breaches of regulations 5 and 31 (3) (*a*) and (*b*) of the Building Regulations. The important exception is the allegation of failure to provide a safe system of working. The first question is: What is the duty which an employer owes to his servant? Mr. Beney referred me to *Wilsons & Clyde Coal Co. Ld.* v. *English*,[1] where Lord Wright cited[2] with approval the well-known definition of those duties by Lord Herschell in *Smith* v. *Baker & Sons*.[3] Lord Herschell said[3]: "It is quite clear that "the contract between employer and employed involves on the "part of the former the duty of taking reasonable care to provide "proper appliances, and to maintain them in a proper condition, "and so to carry on his operations as not to subject those "employed by him to unnecessary risk." In case there is any doubt about the meaning of "unnecessary," I would also take the duty as being a duty not to subject the employee to any risk which the employer can reasonably foresee, or, to put it slightly lower, not to subject the employee to any risk that the employer can reasonably foresee and which he can guard against by any measures, the convenience and expense of which are not entirely disproportionate to the risk involved. I am prepared to approach this case upon whichever of those possible definitions imposes the lowest duty upon the defendants. I also bear in mind Lord Wright's remarks in *Wilsons & Clyde Coal Co. Ld.* v. *English*[4]: "The same principle, in my opinion, applies to those funda- "mental obligations of a contract of employment which lie "outside the doctrine of common employment, and for the "performance of which employers are absolutely responsible. ". . . The obligation is fulfilled by the exercise of due care and "skill."

[His Lordship considered the evidence and continued:] I find as a fact that the accident which happened to the plaintiff was one which his employers could reasonably have foreseen; that the risk was one which could and should have been foreseen, and that the accident was unnecessary in the sense that it could have been prevented or guarded against by the simplest possible measures. It could have been guarded against simply by the use of three or four 9-inch-wide boards placed on the sloping roof. That would have operated as a safeguard in two ways: first, against the risk of overbalancing, in that had the plaintiff fallen on to such boards he would have fallen a distance of a maximum of some 2 feet, and, secondly, he could have performed the work in complete safety by standing on the planks. True, that would have meant standing at an angle of 30 degrees, but I cannot imagine that there would be any very great difficulty in working with a hammer and chisel in that position for the comparatively short time required to chip off the asphalt from the drip edge. In my judgment, it is almost impossible to contend that there was not a risk in kneeling only 9 inches from an edge with a fall of 13 feet to 15 feet.

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[1] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[2] [1938] A.C. 57, 79.

[3] [1891] A.C. 325, 362; 7 T.L.R. 679.

[4] [1938] A.C. 57, 78.

In the result, therefore, I find that the defendants were in breach of their common law duty to the plaintiff, and it becomes, strictly speaking, unnecessary for me to decide the question of breach of statutory duty, but in case the matter goes further, I will express my view.

A breach of regulation 5 of the Building Regulations (as to the provision of scaffolds) is first alleged. Regulation 3 defines "scaffold" as including, amongst other things, "any working "platform," and as meaning "any temporary structure on or from "which persons perform work." I interpret that to mean that if the three or four boards which I have mentioned were placed on the sloping roof to catch a man who overbalanced from above they would not constitute a scaffold, but if they were placed there for the purpose of his standing on and doing his work from them they would constitute a scaffold within the meaning of the definition. I hold, therefore, that regulation 5 requires the provision in the present case of such planks for the purpose of their being used as a place from which to do the work. I find that there was a breach of the statutory duty imposed by regulation 5 in that had such boards been provided the plaintiff could have done the work from their security in complete safety.

The other two breaches alleged are both breaches of regulation 31 (3). Regulation 4 provides that it shall be the duty of every contractor and employer of workmen to whom the regulations apply to comply with regulation 5 and, inter alia, with such requirements of regulation 31 "as relate to any work, act, or "operation performed or about to be performed by such "contractor or employer of workmen." Regulation 31 (3) states: "Where work is being done on or near roofs . . . covered "with fragile materials through which a person is liable to "fall a distance of more than 10 feet"—which was the case here —"(*a*) where workmen have to pass over or work above such "fragile materials, suitable and sufficient ladders, duck ladders "or crawling boards, which shall be securely supported, shall be "provided and used." If this regulation is to apply it must be because the plaintiff had to work "above" the fragile roof. What does "above" mean? Does it mean above in the vertical plane of the fragile roof, or does it mean above merely in the sense of at a greater height? I think that it means the former. In my view, therefore, "working above" means working over in the sense of higher in the vertical plane of the fragile roof. I hold that regulation 31 (3) (*a*) is inapplicable, and it follows that the defendants committed no breach of it.

Regulation 31 (3) (*b*) provides: "Prominent notices stating "that the coverings are fragile shall be affixed at the approaches "thereto." It is not necessary for me to decide precisely what the words "approaches thereto" mean. I should have thought that they applied to work being done on or near roofs, because "approaches" can only mean somewhere where, if a notice were affixed, it would give a warning to a person who was about to work on or near the roof. I am satisfied here that there was a breach of this regulation in that no notice, prominent or otherwise, stating that the coverings were fragile had been affixed anywhere at all. The claim fails, however, so far as there was a breach of that regulation, because that breach had no bearing on, and was not a cause of, the accident. The plaintiff knew at the material time that the roof was fragile and, therefore, it would have been a work of supererogation to have acquainted him by means of notices of that which he already knew.

I turn now to the defence of sole and contributory negligence. In *Caswell* v. *Powell Duffryn Associated Collieries Ld.*[5] Lord Wright said[6]: "What is all-important is to adapt the standard "of what is negligence to the facts, and to give due regard to "the actual conditions under which men work in a factory or "mine, to the long hours and the fatigue, to the slackening of "attention which naturally comes from constant repetition of "the same operation"—these are the words that I emphasize—

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[5] [1940] A.C. 152.

[6] Ibid. 178–9.

"to the noise and confusion in which the man works, to his pre-"occupation in what he is actually doing at the cost perhaps of "some inattention to his own safety. . . . The policy of the "statutory protection would be nullified if a workman were held "debarred from recovering because he was guilty of some care-"lessness or inattention to his own safety, which though trivial "in itself threw him into the danger consequent on the breach "by his employer of the statutory duty." In that case there had been a breach of statutory duty, but I think that what is there said is equally applicable to breach of a common law duty to provide a safe system of working. I can see no distinction in principle.

Of course, I appreciate that it might be said that, as I have found against the defendants on negligence and breach of duty, I ought to accept and apply the same standards to the plaintiff in considering whether he was also guilty of negligence. I do not think that a court ought to be too astute to find a workman guilty of negligence, either as the sole or contributory cause of the accident, when he does not demur to a risk which the employer has imposed upon him, ex hypothesi, by a breach of common law duty or a breach of statutory duty. I am satisfied that the risk which the plaintiff ran was one which employee after employee knowingly, not voluntarily but knowingly, runs; in other words, a risk which is imposed on him by the system of working which is adopted by his employers and to which he does not demur. I am fully alive to the fact that an employee is also under a duty to his employer to take reasonable precautions for his own safety; but I do say that when the failure to do so consists of not demurring to a risk which his employers have imposed on him, the court ought not to be astute in finding contributory negligence. Using the best judgment which I can on the facts and the evidence in this case, I find as a fact that the plaintiff was not guilty of contributory negligence.

In the result, therefore, I find that this action succeeds.

That brings me to the question of damages, which I regard as the most difficult matter in this case. At the time of the accident the plaintiff was 35 years of age; he is now 37, and his expectation of life is a maximum of two years. Mr. Crichton said: "In dealing with the general damages you will have to "deal with the loss of earnings for the period between this man's "death"—at the latest, I am told, at the age of 39—"and the age "to which he would have lived if he had not sustained the "accident." I have no evidence before me, but I should take judicial notice, if necessary, that apart from all the hazards of life a man in A.1 physical health would normally live and work to an age of at least 60. That means that Mr. Crichton invited me to award as part of the general damages some sum to represent the loss of earnings for 21 years during which the plaintiff would no longer be alive. When I expressed some little surprise, Mr. Crichton referred me to the headnote in *Roach* v. *Yates*,[7] a decision of the Court of Appeal, which is, of course, binding upon me. If I thought that the headnote was supported by the judgments, I should unhesitatingly follow it.

The headnote reads: "In a collision between a pedal bicycle "ridden by the plaintiff a bricklayer, 33 years of age, and a car "driven by the defendant, occasioned by the negligence of the "latter, the plaintiff sustained serious injury to the brain rendering him permanently, not only unfit for work, but incapable "of looking after himself and dependent both day and night upon "the care of a nurse, and shortening his expectation of life from "30 to 16 years. At the time of the accident the plaintiff was "earning an average wage of £3 10s. a week. The plaintiff "having brought an action against the defendant for damages "for personal injury, it was agreed between the parties "that the plaintiff's pecuniary losses and expenses by reason of "the accident down to the date of the action amounted to £542, "and in respect thereof and of all his other damages past and "prospective the trial judge awarded him the sum of £2,742 in "all." Subtracting the special damages, the general damages awarded by the trial judge were precisely £2,200. "The plaintiff, "being dissatisfied with that sum, appealed: *Held*, by the Court "of Appeal, that in assessing the amount due to the plaintiff a "proper, though not necessarily the only, method to adopt"—I emphasize the word "proper"—"was to allow him (i) in respect "of his pecuniary losses and expenses down to the date of the "action the said agreed sum of £542; (ii) in respect of his prospective loss of wages the sum which he would have earned during "what, but for the accident, would have been his normal life "according to actuarial tables, subject to deductions for all contingencies, that sum to be not less than £2,000."

I emphasize those words "the sum which he would have "earned during what, but for the accident, would have been his "normal life." His normal life should have lasted for another

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[7] [1938] 1 K.B. 256.

30 years; in fact, of those 30 years he was going to be alive for 16 and dead for 14 if the prognostications of the doctors proved correct. According to the headnote, therefore, the Court of Appeal laid down that the damages must be based not only upon 16 years' loss of wages during actual life but also upon loss of wages for the further 14 years that he would not be alive. The headnote continues: "(iii) in respect of nursing attendance, a sum "sufficient to cover a reasonable weekly payment for that purpose "during the period of his life as shortened by the accident, that "sum being estimated at upwards of £2,000; and (iv) in respect of "his past and future physical and mental pain and suffering, and "the shortening of his life," a further sum, "in estimating which "the following considerations should be kept in view."

Of those four heads of damages, (i) is the special damage, and no question arises on that; but (ii) seems to me to be wholly unsupported by the judgments. In the judgment of Greer L.J. I can see no reference at all to assessing the value of imaginary earnings after the death of the injured party. There was no separate judgment on the part of Mackinnon L.J., but there are dicta in the judgment of Slesser L.J. which do lend support to the proposition stated in (ii) of the headnote. I am satisfied, however, that they are merely dicta. Greer L.J., at the end of his judgment, said [8]: "My learned brothers and I "have to decide what sum in all shall be awarded in this case "as damages to this unfortunate man, and we have come to the "figure of £6,542. That is the sum which, independently, each "member of this court thinks is a proper sum to award in this "case." I read that to mean not that each of the three judges had by a coincidence arrived at the figure of £6,000, but that they had thought that it was the sum which ought to be substituted for the £2,200 found by the trial judge; and that he (Greer L.J.) had arrived at that sum without any reference to the imaginary earnings after death.

I think that Slesser L.J. was saying no more than that he agreed that that was the proper sum, and that it could not be said to be improper, so to speak, particularly bearing in mind the loss of earnings after death, and that that was an element to be taken into consideration derived support from the decision in *Phillips* v. *London & South-Western Railway Co.*[9] Moreover, so far as it is possible to glean from the arithmetic in *Roach* v. *Yates*,[10]

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[8] [1938] 1 K.B. 256, 267.

[9] 5 Q.B.D. 78.

[10] [1938] 1 K.B. 256.

I cannot think that the figure of £6,000 could have been arrived at by taking into consideration the imaginary earnings of the plaintiff for the 14 years during which he ought to have been alive but would be prevented from being alive by the accident. His wages were £182 a year, and his normal expectation of life was 30 years; as a result of the accident, of those 30 years he was going to be alive for only 16 and dead for 14. As I understand it, it would be indisputable that he would be entitled to general damages for the loss of earnings from the date of judgment for the ensuing 16 years, but in computing that all the hazards of life, apart from the accident, would have to be taken into consideration. So far as I can see from the arithmetic, item (ii) was taken as being £2,000. Loss of wages for the 16 years of life at £182 a year would be somewhere between £2,900 and £3,000, and might very properly be discounted to a figure of £2,000; if another 14 years' loss of wages was also taken into consideration the figure would be 30 times £182, discounted for the whole of that period. The £2,000 seems, in my judgment, to be more aptly awarded upon the footing that the remaining 14 years were excluded. At any rate, it is sufficient for me to say that I am unable to find from the judgments in *Roach* v. *Yates* [10] that the Court of Appeal in fact decided any such thing as is ascribed to them in paragraph (ii) of the headnote, and I accordingly consider that the matter is res integra.

Phillips v. *London and South-Western Railway Co.*,[11] referred to by Slesser L.J., a claim by a doctor who was injured in a railway accident, was tried with a special jury before Field J. In summing up he referred to the prospect of the plaintiff's speedy death. The plaintiff was proved to have been earning between £6,000 and £7,000 a year and the jury assessed the damages at £7,000. The plaintiff appealed to the Queen's Bench Division on the ground that the verdict of £7,000 damages was grossly inadequate; it was, indeed, about the amount of one year's earnings. The Queen's Bench Division ordered a new trial and the defendants appealed from that order to the Court of Appeal. The defendants argued in the Court of Appeal that no misdirection had been found by the Queen's Bench Division, and that an appellate court ought not to interfere with the jury's verdict in the absence of misdirection. The Court of Appeal held that the Queen's Bench were right in ordering a new trial, and they did so, as I understand the decision, not on the basis that there had been any misdirection, but on the basis that the assessment was so grossly inadequate as to lead to the inference that it was an entirely erroneous estimate of damages.

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[10] [1938] 1 K.B. 256.

[11] 5 Q.B.D. 78.

James L.J. did use some expressions which are capable of being construed as referring to damages being allowable for losses after death and during the period the injured party would have lived but for the accident; but after quoting from the summing-up by Field J., he said [12]: "The case could not have been put more "favourably for the plaintiff than it was thus put by Field J." I think that he was merely saying that so far as misdirection had been alleged, there was nothing in that allegation because it could not have been put more favourably for the plaintiff, and that the ground on which the order of the Queen's Bench Division for a new trial was upheld was that, to award only the equivalent of one year's salary, without including the salary for whatever period the plaintiff would live, and to quantify the damages, including all his pain and suffering—which were of a terrible description, I think that he was made virtually insane—at the sum of £7,000 was so inadequate, that the jury must have omitted to take into consideration matters which they ought to have taken into consideration.

I am unable to find anything in that case laying down the principle that a plaintiff in circumstances like the present is entitled to have taken into consideration the fact that he is prevented from earning wages over the period between the date of his death and the date to which he would normally have lived but for the accident. I therefore award no general damages on that basis, because I do not think that I am entitled to take them into consideration. Nothing can lengthen the plaintiff's life by the period by which it has been shortened as a result of the accident—restitutio in that sense is impossible—and I cannot think it right that I should give damages for loss of earnings for a period during which ex hypothesi he is not alive to earn them; if I were to give them I would not know upon what possible basis to assess them. The plaintiff might normally have been expected to live for 21 years longer than he is now likely to live. If I were to take his wages at £494 a year, and as remaining the same, and to multiply £494 a year by 21, discount that by a large amount because the capital sum would then be prematurely in his hands, and discount it by all the other hazards of life and arrive at a purely hypothetical figure of, say, £5,000, as a dead man has not to keep himself and cannot spend money, I should be giving him that sum on the footing that he was alive and able to earn the salary when in fact he would be dead, and would not be able to spend it.

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[12] 5 Q.B.D. 78, 87.

This point was present to the mind of Lord Atkin in *Rose* v. *Ford*,[13] when he said[14]: "Can the damages include a calculation "of loss of income which the deceased would have received "during normal expectation of life but would not have saved so "as to increase his estate? I express no opinion." *Rose* v. *Ford*[15] was not a case in which the plaintiff was still alive, but was a claim under the Fatal Accidents Acts, and I am fully alive to the provisions of section 1 (2) (*c*) of the Law Reform (Miscellaneous Provisions) Act of 1934, which provides that where the death of a person has been caused by the act or omission which gives rise to the cause of action, the damages shall be calculated without reference to any loss or gain to his estate consequent on his death. But it is at least strange, if the contention based upon *Roach* v. *Yates*[16] is correct, that so far as I have been able to discover the argument has not yet been advanced, in a case since 1934 where the injured person has died, that damage of this nature does not represent a loss "consequent on his death" as, for example, does the loss of a life interest, the cesser of an annuity, or funeral expenses, but forms part of a cause of action vested in the deceased at the time of his death which accordingly survives for the benefit of his estate by reason of the provisions of section 1 of the 1934 Act.

In my judgment, therefore, the only relevance of earnings which would have been earned after death is that they are an element for consideration in assessing damages for loss of expectation of life, in the sense that a person earning a reasonable livelihood is more likely to have an enjoyable life. Save, therefore, in so far as I have just indicated, I exclude from the general damages any sum for loss of wages between the date of death and the date of the plaintiff's normal expectation of life apart from the accident.

I now have to quantify the damages that I ought to award under the head of prospective loss of wages, limiting that to the actual duration of life. I fix the plaintiff's expectation of life at 18 months; and the quantification becomes simple subject to the allowance which I have to make under the Law Reform (Personal Injuries) Act, 1948. His wages at the time of the accident were £8 3s. 7d. a week, and they are now £9 10s. 1d. a week. The time is so short that I can eliminate any contingencies such as that the plaintiff might die before the expiration of that period. I therefore take a year and a half, 78 weeks, at £9 10s. 1d. a week—that is £741 6s. 6d., and accordingly the sum I award under that head will be that sum less an amount [£224 4s. 6d.] representing the appropriate allowance for the period of 18 months under the Act of 1948 which, of course, will be within the period of five years mentioned in section 1.

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[13] [1937] A.C. 826.

[14] Ibid. 835.

[15] [1937] A.C. 826.

[16] [1938] 1 K.B. 256.

I now come to the question of nursing attendance. Mr. Crichton referred me to section 2 (4) of the Act of 1948 which provides "In "an action for damages for personal injuries (including any such "action arising out of a contract), there shall be disregarded, in "determining the reasonableness of any expenses, the possibility "of avoiding those expenses or part of them by taking advantage "of facilities available under the National Health Service Act, "1946." I think all that means is that, when an injured plaintiff in fact incurs expenses which are reasonable, that expenditure is not to be impeached on the ground that, if he had taken advantage of the facilities available under the National Health Service Act, 1946, those reasonable expenses might have been avoided. I do not understand section 2 (4) to enact that a plaintiff shall be deemed to be entitled to recover expenses which in fact he will never incur. The plaintiff has been in one hospital or another from November 24, 1950, until today, and no claim of any kind is made for special damage in respect of past nursing and attendance. I consider it in the highest degree unlikely that there will be any change in that most desirable position between now and 18 months hence, but as nursing attendance is clearly a justifiable expense if it is incurred, I must have regard not to the probability, but to the possibility that some expense may be incurred under that head during the ensuing 18 months. I think that the possibility is so remote that this head of claim will be adequately met by an award of the sum of £25.

I now come to the last head of damages, for past and future physical and mental pain and suffering and the shortening or loss of expectation of life. I think that so far as it is humanly possible to assess damages for loss of expectation of life upon any basis whatever, the proper figure to take in the case of this particular plaintiff, who had an A.1 prospect of life and was 35 years of age at the time of the accident, bearing in mind the fact that he would have continued to receive wages sufficiently adequate not to cause him to live in penury, is £500.

1953

HARRIS v. BRIGHTS ASPHALT CONTRACTORS LD.

Slade J.

The most serious item of all is the injury the plaintiff sustained in the accident and his past and future physical and mental pain and suffering. [His Lordship reviewed the medical reports and continued:] I have to award a sum for these terrible injuries and suffering, and I assess that sum at £5,000. The agreed special damage is £747 4s.

The damages I award to the plaintiff are, therefore, £6,789 6s. 0d.

Judgment for the plaintiff.

Solicitors: *A. L. Phillips & Co.; Kingsbury & Turner; L. Bingham & Co.*

J. F. L.

1953
Mar. 10, 11, 12.

Pearson J.

ANSON v. ANSON.

[1952 A. No. 92.]

Husband and Wife — Guarantee — Banking account — Guarantee by husband to bank of housekeeping account in wife's name—Payment by husband under guarantee—Right of reimbursement—Presumption of advancement.

A bank account, out of which the housekeeping expenses of a matrimonial home were paid, was kept in the name of a wife who also had a personal bank account elsewhere. The husband made the wife a substantial allowance, but beyond expecting her to keep the housekeeping account in a proper state made no appropriation of the money paid to her. The wife paid most of the sums given to her by the husband into her personal account and the housekeeping account became overdrawn. The husband gave the wife a cheque to pay off the overdraft, but this she paid into her own account, and told the husband that he would have to guarantee the housekeeping account. The husband gave a written guarantee of the housekeeping account to the bank, and the overdraft remained outstanding. Subsequently the parties were divorced and the bank demanded payment of the overdraft from the wife; the wife refused to meet the demand and the bank demanded payment from the husband, who paid £500 under the guarantee. In an action by the husband to recover the £500 from the wife, in which the wife denied that she was indebted to the husband and contended that the transaction was in the nature of an advancement:—

Held, that the essence of a transaction of guarantee was the implied intention that the principal debtor should retain the obligations of a principal debtor and that the surety should remain secondarily liable, and if called on to pay should be entitled to reimbursement; that as between husband and wife, advancement ought not to be presumed unless there was an intention at the time of the giving of the guarantee that there was to be no reimbursement and a special agreement that the husband was to bear the liability; that, on the facts, the husband gave the guarantee, not to relieve the wife of her obligations to the bank, but to resolve an immediate emergency, with the intention that the transaction should have the ordinary incidents of a guarantee; and that the wife, accordingly, was liable to reimburse the husband.

In re Salisbury-Jones [1938] 3 All E.R. 459 applied.

In re a Debtor [1937] Ch. 156; 53 T.L.R. 191; [1937] 1 All E.R. 1 considered.

ACTION.

In September, 1946, the plaintiff, Colonel Claud Ronald Anson, provided £100 to open a bank account at Lloyds Bank, Camberley, in his wife's name. The wife had ample means of her own and already possessed an account at a bank in London. The husband also had an account at Lloyds Bank, Camberley, but it was intended that the account opened in the wife's name should be primarily a housekeeping account out of which she would pay bills relating to the housekeeping at their matrimonial home, and, in fact, the account was so used. The husband made the wife a very large allowance out of which, while making no express appropriation, he expected her to keep her Camberley account in a proper state. Between January 1 and September 5, 1947, the husband paid the wife £4,245. Out of that sum the wife paid only £250 into her Camberley account, which by August 21, 1947, was overdrawn by about £330. The husband became aware of the overdraft and a heated discussion took place at which the wife told the husband that he must arrange something and he told her, in effect, that he had already given her the money and could not pay twice over. The wife said that he must guarantee her account at Camberley, and on August 29, 1947, the husband drew a cheque for £380 in favour of the wife, his intention, as expressed to the wife, being that she should pay it into her Camberley account to pay off the overdraft and provide a small working balance. In fact, the wife paid that cheque into her London bank account. On September 5, 1947, in the course of a telephone conversation the wife told the husband that her London account needed the money and that he would have to guarantee the account at Camberley. On the same day the husband entered into a written guarantee to the bank to the extent of £500, the surplus over the overdraft being intended to provide for contingencies. The husband then stopped the cheque for £380 but from September 6 to December 31, 1947, continued to make the wife a large allowance, paying her, in all, £3,338, out of which she paid £220 into her Camberley account; during 1948 the husband gave the wife £1,205, out of which she paid £50 into her Camberley account. At all material times the wife had a very substantial balance at her London bank and could easily have paid off the small overdraft at Camberley.

In 1949 the parties were divorced, and on November 21, 1950, the Camberley bank made a written demand for payment of the debit balance of her account, then at least £500, from the wife; the wife refused the demand and the bank demanded payment from the husband under the guarantee, and on December 14, 1951, the husband duly paid £500 to the bank.

The husband now claimed from the wife the sum of £500 as money paid under a guarantee entered into at her request. The wife denied that she was indebted to the husband and alleged that the guarantee was not entered into at her request, but was given without her knowledge or approval, and further alleged that money drawn on the Camberley account was in fact used in settling accounts at the request of the husband and for which he was liable; alternatively, that the transaction was in the nature of an advancement by the husband to her which she was not liable to repay.

John Hobson for the husband referred to *In re a Debtor* [1] and *Biberfeld* v. *Berens*.[2] A husband and wife are capable of entering into contractual or quasi-contractual relations with each other. The husband's claim is based on implied contract and also in equity, which will intervene to adjust the relationship between husband and wife. The consequences of the wife's request for a guarantee are that the husband, having been called upon to pay, is entitled to be indemnified; it was the mutual intention at the time of the giving of the guarantee that that result should follow. The wife was not an agent of the husband for raising money. If a husband puts his wife in a position to obtain credit there must be an implied term of the transaction at the time it was entered into that the husband, if called on to pay, would be repaid by the wife.

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[1] [1937] Ch. 156; 53 T.L.R. 191; [1937] 1 All E.R. 1.

[2] [1952] 2 Q.B. 770; [1952] 2 T.L.R. 39; [1952] 2 All E.R. 237.

There is no question of advancement; there was no intention by the husband to make an advancement. In *In re Salisbury-Jones*,[3] the only authority on this point, Simonds J. said[4]: "I "decline to extend the doctrine of advancement in that way." That case is relied upon; it was held that a husband in paying the mortgagee was discharging a legal obligation under his guarantee and that there could be no question of a gift, and no presumption of an advancement.

D. A. Fairweather for the wife. Prior to the Married Women's Property Act, 1882, a wife could not hold property, except her separate estate, in her own right; that Act, which permitted her to hold property, provided, by section 17, a machinery for settling disputes such as this. A husband should not issue a writ against his wife in a matter of this kind; he should proceed under section 17.

[PEARSON J. That might be so if they were still married.]

Change of status does not affect the position: *Dunbar* v. *Dunbar*.[5] Rights do not arise between husband and wife as between strangers. *Bendall* v. *McWhirter*,[6] in particular the remarks of Romer L.J.,[7] shows that a matter like this is a question for the discretion of the court. It is submitted that, in the light of that case, the statement of the law in that respect in *In re Salisbury-Jones*[8] is inaccurate.

The husband intended to place a sum of money at his wife's disposal; the situation is the same as that in which a husband has put property, money or money's worth at his wife's disposal and there is a presumption of advancement: *In re Eykyn's Trusts*.[9] In a transaction resulting in the detriment of the husband and a gain to the wife the presumed intention of the husband at the time of the transaction is to make a gift to the wife. The transaction must be looked at as a whole; all that occurred was that the husband made arrangements so that the wife could draw on his credit, and she did in fact do so in the manner envisaged between them. Giving credit facilities is not the same thing as guaranteeing a debt and the husband cannot claim the ordinary rights of a surety as against a principal debtor.

John Hobson replied.

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[3] [1938] 3 All E.R. 459.

[4] Ibid. 461.

[5] [1909] 2 Ch. 639; 25 T.L.R. 230.

[6] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

[7] Ibid. 488.

[8] [1938] 3 All E.R. 459.

[9] (1877) 6 Ch.D. 115.

PEARSON J. stated the facts, held that the Camberley account was the wife's account and that she was liable for repayment of the overdraft; that the husband by giving the guarantee did not, to the wife's knowledge, intend to relieve her of her liability, and continued:—On those facts, what is the legal position? Prima facie, if this is to be treated as an ordinary case of one person guaranteeing another person's account, the ordinary rule, that the guarantor, having been called upon to pay the debt, is entitled to reimbursement, would apply. The question is whether any special defence can be established on the facts of this case, including the important fact that at the material time when the guarantee was given the parties were husband and wife. By para. 2 of the defence it is alleged: "The said guarantee was "not entered into at the request of the defendant but was "entered into without her knowledge or approval." On the facts I do not accept that defence. I find that the guarantee was entered into at her request and with her knowledge and approval. Then, by para. 3: "Sums of money drawn by the defendant "on the said account were in fact expended during coverture in "settling accounts at the request of the plaintiff and for which "the plaintiff was liable." I do not find that it was used in settling accounts at the request of the plaintiff, but it was to some considerable extent used in settling accounts in respect of household bills, and to that extent that paragraph is partly true. Although that is not decisive of the issue, it is, or may be, an important factor in considering what the intentions of the parties were. It is, however, perfectly possible for a wife and a husband to agree that household bills shall be paid from her account and that the liability shall be hers—in fact, that is probably the normal position. Finally, the defence states: "Alternatively, the "whole transaction was in the nature of an advancement by the "plaintiff to the defendant (his wife) and the defendant is not "liable to repay the same to the plaintiff." The theory of advancement is not very easy to apply to a case of a bank guarantee, because the presumption of advancement normally arises when the husband buys property in his wife's name; whereas in a normal case where there is no special relationship between the parties there would be a resulting trust in favour of the person who provided the money, as between husband and wife the presumption, which is called one of advancement, is the other way: that is, and I think it is the normal use of the word "advancement" in this connexion, the husband is presumed to have intended the property so bought to become the wife's property by way of a free gift from him. When that theory is applied to the case of a bank guarantee I think it must be understood as meaning that there was an intention that the husband should not have the right of reimbursement. For advancement to be presumed in such a transaction it would have to be interpreted as a transaction of a very special character, in that, although the husband gives a guarantee of his wife's account, there is a special arrangement, expressed or implied, between him and his wife whereby he is expected to bear the liability and is not expected, or entitled, if he is called upon to pay and does pay, afterwards to claim reimbursement.

There are two possible legal bases for the right of reimbursement by a surety against the principal debtor left open by the authorities. The orthodox or more usual basis upon which it can be placed appears from *In re a Debtor*,[1] where the Court of Appeal had to consider what was the origin or essential nature of this right of reimbursement. In that case the position depended on whether the obligation should be treated as having arisen before or after a given date; the guarantee had been given in 1933 and the guarantor was called on to pay in 1936, and it had to be decided whether the obligation arose in 1933 or 1936, before or after the Law Reform (Married Women and Tortfeasors) Act, 1935, came into operation. For that purpose the Court of Appeal had to consider what was the nature of the right, and the answer was in the main that in the normal case where a guarantee is given by a surety at the request of the principal debtor the right of reimbursement is of a contractual character and arises from an implied contract. Slesser L.J. referred to it as [2] " the implied undertaking of the principal debtor " to repay the money paid on her behalf." It appears therefore that the right can be placed on that basis of presumed contract or implied contract or, I am tempted to say, actual contract, because in the normal case what occurs, expressly or impliedly, is that A, who wishes to overdraw, or has an existing overdraft, says to B: " Will you please give a bank guarantee of my overdraft?", and B says: "Yes, I will," and proceeds to do so. That is an agreement between the two of them, the terms of which can be worked out on ordinary contractual lines, applying the principles with regard to implied terms. The intention as between the two of them normally is that the principal debtor

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[1] [1937] Ch. 156; 53 T.L.R. 191; [1937] 1 All E.R. 1.

[2] [1937] Ch. 156, 161.

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shall remain the principal debtor; it is his debt and his obligation and he is expected to pay it. If the surety is called upon to pay and does pay, that for the time being defeats the intention of the parties that the debt shall be and remain that of the principal debtor. In order to put that position right, and to restore it to the position intended between the two of them by their original contractual intention, it is necessary that the right of reimbursement should be read into the contract or inferred to be one of the terms of the contract. The essence of the matter is that the principal debt is primarily the obligation of the principal debtor, while the liability of the surety is only a secondary liability, and it is the intention as between the surety and the principal debtor that that position should be preserved. That is the explanation on contractual lines of the implied term which confers the right of reimbursement.

It is of some interest to observe that in the judgment of Greene L.J. in that case there is an indication of a second possible foundation for the right of reimbursement, which throws some light on the present case. Greene L.J. said [3]: "Now where, as "in the present case, the implied request for payment is referable "to a request to give a guarantee, the contractual basis of the "action is apparent, and the difference between the old form of "action of indebitatus assumpsit and an action on a special "contract to indemnify disappears for all practical purposes. "The question whether or not the subsection applies cannot, in "my opinion, be affected by the fact that it would have been "open to the plaintiff to bring his action on an indebitatus "assumpsit instead of declaring on the implied undertaking "to indemnify." He referred to *Crampton* v. *Walker*,[4] and *Hamilton* v. *Goold*,[5] and continued [6]: "A question may arise as "to the application of the subsection in a case where a guarantee "is given without any antecedent request on the part of the "debtor. That case is merely one example of a number of cases "where the law raises an obligation to indemnify irrespective of "any actual antecedent contractual relationship between the "parties. A quite recent example of a case where the law raises "such an obligation irrespective of antecedent contract is to be "found in a case decided in this court of *Brook's Wharf and Bull* "*Wharf Ld.* v. *Goodman Brothers*." [7]

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[3] [1937] Ch. 156, 166.

[4] (1860) 3 El. & El. 321.

[5] (1839) 1 Ir.L.R. 171.

[6] [1937] Ch. 156, 166.

[7] [1937] 1 K.B. 534; 53 T.L.R. 126; [1936] 3 All E.R. 696.

Brook's Wharf and Bull Wharf Ld. v. *Goodman Brothers*[7] was a case in which importers had put imported goods into a bonded warehouse and the warehousemen were compelled to pay out of their own moneys the appropriate customs duties, although there had been no prior request from the importers to do so, because it was an obligation imposed on them by law. The warehousemen reclaimed the sum paid by them from the importers, and it was held that their claim succeeded. Lord Wright said[8]: "Under these circumstances the plaintiffs claim "that they are entitled to recover from the defendants the "amount which they had paid to the Customs in respect of duties "due on the defendants' goods. They make their claim as for "money paid to the defendants' use on the principle stated in "Leake on Contracts. The passage in question is quoted in "the Exchequer Chamber by Cockburn C.J. in *Moule* v. *Garrett*,[9] "and is in these terms: 'Where the plaintiff has been compelled "'by law to pay, or, being compellable by law, has paid money "'which the defendant was ultimately liable to pay, so that the "'latter obtains the benefit of the payment by the discharge "'of his liability; under such circumstances the defendant is "'held indebted to the plaintiff in the amount.' This passage "remains, with a slight verbal alteration, in the eighth edition of "Leake on Contracts at p. 46. The principle has been applied "in a great variety of circumstances. . . . These statements "of the principle do not put the obligation on any ground "of implied contract or of constructive or notional contract. The "obligation is imposed by the court simply under the circum- "stances of the case and on what the court decides is just and "reasonable, having regard to the relationship of the parties."

That is a possible alternative basis of the right of reimbursement, and I think the passage cited from Leake on Contracts is of interest as tending to confirm the explanation which I have sought to give of the way in which the relations of the parties are worked out on the contractual basis. The essence of the matter, as I have said, is that the debt is the debt of the principal debtor and so remains, and therefore when the surety is called upon to pay the position has to be put right between the parties so that the liability comes once more to be the liability of the principal debtor.

In *In re Salisbury-Jones* the headnote[10] states: "Upon

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[7] [1937] 1 K.B. 534; 53 T.L.R. 126; [1936] 3 All E.R. 696.

[8] [1937] 1 K.B. 534, 543.

[9] (1872) L.R. 7 Ex. 101, 104.

[10] [1938] 3 All E.R. 459.

"a mortgage by the wife, the husband joined as surety, "the two covenanting jointly and severally to pay the "mortgage debt. The wife received the mortgage money "from the mortgagees. Later the mortgagees during the lifetime of the wife called upon the husband as such surety to "repay the mortgage moneys, which he did. After the death "of the wife the husband sought to prove in her estate as a "creditor for the sum so paid, when it was contended that he "had no right to prove as a creditor since the payment was an "advancement of the wife:—Held, the husband in paying the "mortgagee was discharging a legal obligation under his guarantee, and, in such circumstances there could be no question of "making a gift and no presumption of an advancement. Upon "payment he became entitled to all remedies of a surety who "has paid the debt of the principal debtor, and, in the absence "of any evidence of a release by him, he was entitled to prove in "the estate as a creditor." Simonds J. said[11]: "It is clear that "he has paid those sums, and that he has paid them in consequence of the demand made upon him as surety to repay the "principal sum and interest due by the principal debtor to the "mortgagees. If that were all, the claim which he makes would "be unanswerable, but it is urged on behalf of the estate of the "intestate that that claim cannot be sustained, and cannot be "sustained for two reasons. In the first place, it is said that, "the relation between the parties being that of husband and "wife, the sums paid by the husband to the mortgagee society "are to be deemed to be gifts made by the husband to the wife, "and that claim is based upon this. It is said that, where a "husband purchases property in the name of a wife, and there "is no evidence to show that it was not a gift, the presumption "that it is a gift prevails. It is urged that a similar equity is "applicable in a case of this kind, where the husband has joined "as surety to guarantee a debt due by the wife to the husband." I think that the last word in that sentence should be "mortgagee" instead of "husband." The judgment continues: "No authority of any kind has been adduced in support of that "view. I decline to extend the doctrine of advancement in that "way. The case has been put, really, in two ways. First of "all, it is said that at the inception of the transaction, when "the husband entered into a contract of guarantee, he did so by "way of advancement. That is to say, from the moment the

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[11] [1938] 3 All E.R. 459, 461.

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"transaction began, he is to be deemed, in the absence of "evidence to the contrary, to be in some way advancing his "wife and making a gift to her. That view, I think, was not "persisted in, but at a later stage it was urged that at any rate "at the moment of every payment so made in pursuance of "his obligation the husband is to be deemed to be advancing "his wife. That seems to me to be a quite untenable proposi"tion. The husband made the payments, at the moment when "he made them, in pursuance of a legal obligation which he was "under to the mortgagee society. A demand being made, he "fulfilled his obligation, and, from the moment of fulfilling his "obligation, he became entitled to claim against the principal "debtor for the sums which he so paid. He had all the rights "at law and in equity of a surety who pays off the principal "debtor's debt, and, as it appears to me, the wife, or those "claiming through her, must show that in some way he released "that right." Then he went on to say that there was no evidence of the right having been released.

That, prima facie, is the position here. But it is possible to conceive a case as between husband and wife in which the right of reimbursement might be excluded by express or implied agreement between the parties at the moment when the guarantee is given. Suppose a case where the wife had no substantial resources of her own, but had an account at the bank in her own name, being her own account, out of which she paid the household bills and her own personal expenses, and which was fed by her husband by regular monthly payments. Suppose that in such a case in one particular month the husband was unable to provide the money, but was able to arrange by himself giving a bank guarantee to provide an overdraft for the wife on that bank account; and suppose he said to his wife expressly or by implication: "This "new guarantee arrangement that I have made will involve your "being in debt to the bank, but you need not worry about it, "because this arrangement is entirely for my convenience; it "will be my debt, and I will pay it and you will not be concerned "in it." If something of that sort had been said, I think it would be very arguable that, working out the position on a contractual basis, one should read into the implied contract a term excluding the right of reimbursement. The main question here is whether such a term can be implied. On the special facts of this case, there can be no such implication, indeed, I think the facts point the other way. The husband made it plain to his wife that he was not going to relieve her of the debt. The intention was that, it being already her debt, it should remain her debt, and he gave this instrument of guarantee to the bank, not to relieve her of the obligation, but to solve the immediate banking emergency. If he had meant to relieve her of her obligation he would have done so by a direct payment to her account. In those circumstances, the ordinary position as between surety and principal debtor prevails as in *In re Salisbury-Jones*,[12] and I think that the proper view of the matter is that the wife is liable to reimburse the husband for the sum which he has paid. I hold, therefore, that the sum of £500 is due from the wife to the husband.

Judgment for the plaintiff.

Solicitors: *Glover & Co.; A. E. Hamlin, Brown, Veale & Twyford.*

J. F. L.

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[12] [1938] 3 All E.R. 459.

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March 9,
10, 19.

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HARRISON & JONES LD. *v.* BUNTEN & LANCASTER LD.

Sale of Goods—Sale by trade description—Mistake by buyers and sellers as to meaning of description—Delivery of goods in accordance with description—Effect of mutual mistake.

When goods, whether specific or unascertained, are sold under a well-known trade description without misrepresentation, innocent or guilty, and without breach of warranty, the fact that both parties to the contract are unaware that goods of that known trade description lack some particular quality does not constitute such a mutual mistake of fact as will render the contract a nullity even though, from the point of view of the buyer, the mistake may turn out to be of a fundamental character.

Bell v. *Lever Brothers Ld.* [1932] A.C. 161; 48 T.L.R. 133 considered.

SPECIAL CASE stated by the Appeal Committee of the Kapok Trade Association.

The appellants (the buyers), Harrison & Jones Ld., were manufacturers of articles made of kapok, and the respondents (the sellers), Bunten & Lancaster Ld., who were members of the Kapok Trade Association, carried on business as importers of kapok. By a contract in writing dated February 21, 1951, and made in the abridged form of contract of the Kapok Trade Association, the sellers agreed to sell and the buyers agreed to buy "100 "bales of Calcutta kapok, 'Sree' brand, at 36 pence per pound "c.i.f. net delivered weights, shipment during the months of "June, July and August, 1951, from Calcutta to a main basis "port, option to be declared by buyers by June 1, 1951." The contract contained a guarantee of quality in the following words: "To be equal to standard sample marked 'Sree' brand in our" (the sellers') "possession." The contract further provided that it was made on the terms and conditions of the standard form of the Kapok Trade Association. By a second contract, dated May 28, 1951, in substantially similar terms, the buyers agreed to buy from the sellers 200 bales of the same commodity.

On May 24, 1951, the sellers sent to the buyers samples of Calcutta kapok, "Sree" brand. The goods were duly shipped from Calcutta and arrived at Liverpool on August 22, 1951. On October 11, 1951, the buyers wrote to the sellers informing them that having begun to use the 200 bales of kapok, which formed the subject-matter of the second contract, it had been found that the commodity supplied contained an admixture of cotton which rendered it unsuitable for use in their machines. Correspondence subsequently took place between the parties from which it appeared that the buyers, when entering into the contracts, had intended to buy pure kapok, and also that the sellers, when their attention was called to the fact that the commodity which they had sold was not pure kapok, had no knowledge of the fact that it was other than pure kapok. The buyers eventually claimed that they were entitled to reject the goods. Arbitrators were appointed and on their failing to agree an umpire was appointed. At that time one of the principal differences between the parties was whether the provisions laid down in the standard conditions of the Kapok Trade Association and in their by-laws and regulations appropriate to a quality arbitration should be followed, or those relating to an arbitration in a dispute other than one as to quality.

The umpire awarded that the dispute was one as to quality and should therefore be dealt with under the quality clause of the standard form of contract. He made two awards, one in respect of each consignment, in the same terms in favour of the sellers. The buyers appealed from the awards to the Appeal Committee of the Kapok Trade Association. Before the committee it was contended for the buyers that: (i) The goods under both contracts were sold by description as "Calcutta kapok, 'Sree' brand." (ii) In the kapok trade kapok meant species and grades of tree cotton and no other type of cotton. (iii) The term cotton was applied only to species and grades of bush cotton. (iv) Kapok and cotton were separate and distinct commercial commodities. (v) The goods delivered under each of the contracts consisted of kapok mixed with cotton to the extent of 10 to 12 per cent. of the whole. (vi) In the kapok trade any reference to kapok, with or without the addition of a reference to any particular brand, meant, and was understood to mean, pure kapok. (vii) In the kapok trade a mixture of kapok and cotton was described as cotton/kapok. (viii) The distinction between kapok and cotton/kapok was recognized and provided for by the British Standards Institution and by the Rag Flock and other Filling Materials Act, 1951, and regulations made thereunder. (ix) The sellers did not know at the time when they entered into the contracts that the goods would contain an admixture of cotton. (x) Had they done so they would have quoted the goods to the buyers as cotton/kapok and sold them with that description. (xi) The buyers, as the sellers at all material times well knew, bought the goods for manufacturing purposes. (xii) The goods were not suitable for the buyers' requirements and in particular their machinery could not work cotton/kapok. (xiii) When the goods were put through the buyers' machinery, they discovered that the goods were cotton/kapok and immediately rejected them and claimed against the sellers. (xiv) It was not commercially possible for the buyers to discover the fact before putting the goods through their machinery. (xv) Twenty bales out of the two contracts were opened and/or put through the buyers' machines and 280 bales were available to be returned to the sellers. (xvi) In the circumstances the goods delivered under each of the contracts were not Calcutta kapok and the dispute between the parties was not one as to quality. (xvii) The buyers were entitled to reject the goods or, alternatively, to damages for breach of contract.

It was contended for the sellers that: (i) Calcutta kapok, "Sree" brand, was a brand which always contained an admixture of cotton which might be as high as 15 per cent. (ii) The goods delivered to the buyers were kapok containing an admixture of between 10 and 12 per cent. of cotton. (iii) The goods delivered to the buyers answered the description in commercial language of Calcutta kapok. (iv) The goods delivered answered the description of Calcutta kapok, "Sree" brand. (v) The goods delivered were not suitable for the requirements of the buyers in that their

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machinery was not adapted to working kapok which contained any admixture of cotton. (vi) The dispute between the parties was one as to quality only.

The committee found as facts that: (i) The word kapok meant all species and grades of tree cotton. (ii) What was commonly called cotton was comprised of bush cotton which was different from tree cotton. (iii) Calcutta kapok, " Sree " brand, was a brand of kapok which was known in the trade to contain an admixture of bush cotton. (iv) The goods supplied consisted of kapok with an admixture of approximately 10 to 12 per cent. of cotton fibres. (iv) It was not proved to their satisfaction that the goods did not correspond to the standard sample referred to in each of the contracts; and (v) the goods delivered by the sellers answered the description of Calcutta kapok, " Sree " brand, contained in the contracts.

The appeal committee stated their award in the form of a consultative case and asked the court for its opinion on the following questions: (I) Whether on the facts found and on the true construction of the contracts the dispute between the buyers and the sellers was a dispute as to quality within the meaning of the provisions of the standard form of the Kapok Trade Association; (II) whether the buyers were entitled to reject the goods; and (III) whether the buyers were entitled to damages from the sellers.

Ashton Roskill Q.C. and *R. S. Nicklin* for the appellants (buyers). The correspondence annexed to, and forming part of, the special case shows that the parties intended to sell and buy pure kapok and that they contracted on the basis that pure kapok would be delivered. Pure kapok (tree cotton) is totally different from the mixture of bush cotton and kapok that was in fact delivered. Both parties were, therefore, mistaken in regard to a fundamental matter relating to the quality of the article in which they were dealing. The Appeal Committee's finding that Calcutta kapok, " Sree " brand, was a brand of kapok known in the kapok trade to contain an admixture of cotton must be disregarded since it is clear that neither the appellants nor the respondents were aware of the fact.

In *Bell* v. *Lever Brothers Ld.*[1] Lord Atkin said: " Mistake " as to quality of the thing contracted for raises more difficult " questions. In such a case a mistake will not affect assent unless " it is the mistake of both parties, and is as to the existence of

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[1] [1932] A.C. 161, 218; 48 T.L.R. 133.

"some quality which makes the thing without the quality essentially different from the thing as it was believed to be." Lord Thankerton[2] applied a subjective test, namely: did what the parties had in mind amount to an essential and integral element of the subject-matter? Applying either test in the present case, it is submitted that there was an operative mutual mistake on a fundamental matter: see also *per* Lord Wright in *Norwich Union Fire Insurance Society Ld.* v. *Wm. H. Price Ld.*[3]

In *Nicholson and Venn* v. *Smith Marriott and Another*[4] there was a mutual mistake as to the quality of the article sold, and Hallett J. considered that it was fundamental and vitiated the parties' consent to the contract. Here the mistake as to quality was in relation to unascertained goods and affected the subject-matter of the contract. The mixture delivered was essentially different from pure kapok. What was missing was a quality which rendered the article delivered essentially different from what the parties supposed it to be. Further, both parties regarded the delivery of pure kapok as the essential and integral object of the contract. The result is that the contract was either void because the parties were under a common mistake of a fundamental character or voidable on some equitable ground: see the observations of Denning L.J. in *Solle* v. *Butcher*.[5] If the contract is voidable, the dispute between the parties is within the ambit of the arbitration clause and the questions submitted to the court in para. 24 of the case should be answered: (i) No; (ii) Yes; (iii) Yes. If, on the other hand, the contract is void, there is no dispute within the arbitration clause because there is then "no dispute arising out of this contract," which are the words of the arbitration clause: see *Heyman and Another* v. *Darwin's Ld.*[6] Therefore, if the contract is void, the Appeal Committee must be told that they had no jurisdiction to determine the dispute between the parties and that accordingly the questions asked in the case do not fall to be answered by the court.

MacKenna Q.C. and *H. E. Park* for the respondents (sellers). The question whether the contract in the present case was void or voidable was not raised before the committee and consequently there are no findings by the arbitrator relevant to the case for the appellants, and the contentions made on their behalf cannot rightly be put forward. There were here two written contracts for the sale of unascertained goods described by each party in the same terms. There was a brand of goods on the market answering that description which were shipped by the sellers. In those circumstances there is no possible ground on which the buyers could reject the goods. It is immaterial that they did not know that the brand of kapok sold contained a mixture of cotton, and it makes no difference that the sellers were under the same misapprehension. The buyers got the goods they ordered and they cannot be relieved of their bargain by saying that they did not realize the nature of the goods: see *Ryder* v. *Woodley.*[7] There was no fundamental mistake by the buyers, (1) because this was a contract for the sale of goods by description and there was in fact a brand of goods on the market answering the contract description, and (2) because the parties were not proceeding on the basis that the buyers' belief about the nature of the goods was fundamental to the contract.

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[2] [1932] A.C. 161, 235.

[3] [1934] A.C. 455, 463; 50 T.L.R. 454.

[4] (1947) 177 L.T. 189.

[5] [1950] 1 K.B. 671, 692; 66 T.L.R. (Pt. 1) 448; [1949] 2 All E.R. 1107.

[6] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.

When a buyer orders goods of a particular brand and the seller agrees to sell such goods, the seller's unexpressed belief regarding the nature or quality of goods of that particular brand must be irrelevant if he gives no warranty as to the nature or quality of the goods: see *Bell* v. *Lever Brothers Ld.*[8]; *Leaf* v. *International Galleries.*[9] If the above submissions are wrong, and the contract was void or voidable on the ground of mistake, the question arises whether that issue could be raised in an arbitration on the words of the arbitration clause in the present contract. It is submitted that *Heyman and Another* v. *Darwin's Ld.*[10] shows that such a dispute as arose in this case does not fall within the terms of the arbitration clause in the present contract.

Ashton Roskill Q.C. in reply.

Cur. adv. vult.

March 19. PILCHER J., after stating the facts and reading the contentions before the Appeal Committee, continued: On the hearing of this case before me, Mr. Roskill, on behalf of the buyers, contended that it was clear on the face of the award and the documents scheduled to the award that both buyers and sellers intended to deal in pure kapok not containing any admixture of cotton. No specific finding of fact on this point was made by the Appeal Committee. Certain letters which passed between the parties after the buyers had found that the commodity was unsuitable for their purposes seem to indicate that the sellers were recognizing at that time that they did not then realize that what they had sold was not pure kapok. Founding himself on the proposition that both the parties had entered into the contracts in question in a mistaken belief as to a fundamental question of fact (namely, that they both thought that they were dealing in pure kapok, whereas in fact they were not), Mr. Roskill submitted that the two contracts were nullities. No information is provided in the award as to the circumstances in which the contracts were negotiated between the parties—that is to say, whether the sellers were informed that the buyers required pure kapok, or which party suggested that the commodity to be dealt in should be Calcutta kapok, " Sree " brand—and it is essential to bear in mind in this case that no question arises of representation, misrepresentation or breach of warranty of any kind. On the other hand, the fact seems to be that the buyers, who were manufacturers of articles made of kapok, were ignorant of what the committee has found to be a fact, namely, that Calcutta kapok, " Sree " brand, is a brand of kapok which is known in the kapok trade to contain an admixture of bush cotton. When the minds of the sellers were directed to this particular point after the trouble arose, it would seem that they also were equally ignorant of the exact composition of Calcutta kapok, " Sree " brand.

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[7] (1862) 10 W.R. 294.

[8] [1932] A.C. 161; 48 T.L.R. 133.

[9] [1950] 2 K.B. 86; 66 T.L.R. (Pt. 1) 1031; [1950] 1 All E.R. 693.

[10] [1942] A.C. 356, 366; 58 T.L.R. 169; [1942] 1 All E.R. 337.

As I have said, Mr. Roskill submitted that the contracts in question were nullities on the ground of mutual mistake of fact on a fundamental point. He cited certain passages from the speeches of their Lordships in the well-known case of *Bell* v. *Lever Brothers Ld.*[1] I will consider those passages later. He also relied on the judgment of Denning L.J. in *Solle* v. *Butcher*[2] in support of an argument which he advanced that, even if the contracts were not void ab initio, they were in all the circumstances voidable on equitable grounds. He further relied on a passage in *Norwich Union Fire Insurance Society* v. *Price.*[3] The particular passage is in the judgment of the Privy Council which was delivered by Lord Wright. He said[4]: " It is true " that in general the test of intention in the formation of con- " tracts and the transfer of property is objective; that is,

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[1] [1932] A.C. 161; 48 T.L.R. 133.

[2] [1950] 1 K.B. 671; 66 T.L.R. (Pt. 1) 448; [1949] 2 All E.R. 1107.

[3] [1934] A.C. 455; 50 T.L.R. 454.

[4] [1934] A.C. 455, 463.

"intention is to be ascertained from what the parties said or "did. But proof of mistake affirmatively excludes intention. "It is, however, essential that the mistake relied on should be "of such a nature that it can be properly described as a mistake "in respect of the underlying assumption of the contract or "transaction or as being fundamental or basic. Whether the "mistake does satisfy this description may often be a matter of "great difficulty."

Mr. Roskill's argument was two-fold: that the contracts were either void on the ground of mutual fundamental mistake or voidable in equity. The first matter to which I wish to draw attention is that the point which Mr. Roskill seeks to make was not made at the arbitration or before the appeal committee and finds no place in the buyers' contentions. Mr. Roskill conceded that no reference had been made to this point at the arbitration. One of the principal issues between the parties at the arbitration and before the appeal committee seems to have been whether the dispute was as to the quality of the goods or not. Neither party asked the appeal committee to state the point which Mr. Roskill now seeks to make as a point of law for the consideration of the court; but Mr. Roskill contends that he is none the less entitled to raise the point here and to have it decided in his favour, if it is a good one. He concedes that if his point is good, the result will be, on one view, that there never were any contracts, and, consequently, that there never was an arbitration clause under which the parties could arbitrate their disputes, whether as to quality or otherwise. That is a fact which, I think, is made clear in many cases, particularly in *Heyman and Another* v. *Darwin's Ld.*[5] In that case Viscount Simon L.C. said this[6]: "If the dispute is whether the contract "which contains the clause has ever been entered into at all, "that issue cannot go to arbitration under the clause, for the "party who denies that he has ever entered into the contract is "thereby denying that he has ever joined in the submission. "Similarly, if one party to the alleged contract is contending "that it is void ab initio (because, for example, the making of "such a contract is illegal), the arbitration clause cannot "operate, for on this view the clause itself also is void."

On the view that the contracts were voidable in equity, Mr. Roskill submitted that the court should answer the only really material question—namely, whether the buyers were entitled to reject the goods—in the affirmative. On the facts of the case, in so far as they appear in the award, neither party was at fault, unless it can be said that one or other or both of them should have known the composition of the commodity with which they were dealing under a trade description or brand. I am well satisfied that it would not be right on the facts of this case to say that the contracts were voidable on equitable grounds, and I do not propose to say any more about that. If the buyers argue that the contracts were void ab initio on the ground of mutual mistake of a fundamental character, the curious result follows that the contracts with their arbitration clause were nullities and proceedings which have been followed under the arbitration clause have been so much waste of time.

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[5] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.

[6] [1942] A.C. 356, 366.

I think, however, that the point which Mr. Roskill now seeks to raise is unsound. The true view of the situation is, in my opinion, as follows. These were sales by description of unascertained goods for future delivery with a provision that the buyers should be provided with samples. The contracts were in writing and in each contract the goods were described as "Calcutta "kapok, 'Sree' brand." "Sree" brand is a brand of kapok known in the kapok trade to contain an admixture of cotton. The goods supplied by the sellers to the buyers answered the trade description of Calcutta kapok, "Sree" brand. Samples were sent and the buyers did not satisfy the appeal committee that the goods supplied did not correspond to the sample. No question of misrepresentation or breach of warranty arises. In these circumstances I can see no ground for the suggestion that the buyers are entitled to reject the goods which in quality and composition correspond accurately to the description by which they were known in the trade, merely because they—the buyers—when entering into the contract, and the sellers after the trouble arose, were under the impression that goods of this description consisted of pure kapok. As the point now argued was not raised at the arbitration, there is no finding whether the mistake was of a fundamental character. This is a question of fact which, as has often been pointed out in this type of case, is by no means always easy to determine.

Had I felt any real doubt as to the way in which the case ought to be decided in law, I should have been tempted to remit it to the appeal committee for a specific finding of fact on this point. Taking the view which I do of the law, I find it unnecessary to take this course. *Ryder* v. *Woodley*[7] seems to show that in this type of case a mistaken belief by the buyers as to the nature and the quality of goods bought by description is immaterial, provided that goods which answered the description were delivered. It is not easy in principle to see why the fact that the sellers also shared the mistaken belief should be material. Bearing in mind that the case with which I am concerned is one in which no question of misrepresentation or breach of warranty arises, the following passage from the speech of Lord Atkin in *Bell* v. *Lever Brothers Ld.*[8] seems to be in point. He said: "A buys B's horse; he thinks the horse is "sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known as the fact "is that the horse is unsound. If B has made no representation "as to soundness and has not contracted that the horse is sound, "A is bound and cannot recover back the price. A buys a "picture from B; both A and B believe it to be the work of an "old master, and a high price is paid. It turns out to be a "modern copy. A has no remedy in the absence of representa-"tion or warranty. A agrees to take on lease or to buy from B "an unfurnished dwelling-house. The house is in fact unin-"habitable. A would never have entered into the bargain if he "had known the fact. A has no remedy, and the position is the "same whether B knew the facts or not, so long as he made no "representation or gave no warranty. A buys a roadside garage "business from B abutting on a public thoroughfare: unknown "to A, but known to B, it has already been decided to "construct a by-pass road which will divert substantially the "whole of the traffic from passing A's garage. Again A has no "remedy. All these cases involve hardship on A and benefit "B, as most people would say, unjustly. They can be sup-"ported on the ground that it is of paramount importance that "contracts should be observed, and that if parties honestly "comply with the essentials of the formation of contracts—i.e., "agree in the same terms on the same subject-matter—they are "bound, and must rely on the stipulations of the contract for "protection from the effect of facts unknown to them."

Leaf v. *International Galleries*[9] was concerned with the sale of a picture innocently represented by the vendor to have been painted by Constable. After five years, the buyer claimed rescission of the contract on the ground of innocent misrepresentation. I only refer to that case because of the following passage in Denning L.J.'s judgment [10]: " In my opinion, this case is " to be decided according to the well-known principles applicable " to the sale of goods. This was a contract for the sale of goods. " There was a mistake about the quality of the subject-matter, " because both parties believed the picture to be a Constable; " and that mistake was in one sense essential or fundamental. " But such a mistake does not avoid the contract: there was no " mistake at all about the subject-matter of the sale. It was a " specific picture, 'Salisbury Cathedral.' The parties were " agreed in the same terms on the same subject-matter, and " that is sufficient to make a contract."

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[7] (1862) 10 W.R. 294.

[8] [1932] A.C. 161, 224; 48 T.L.R. 133.

[9] [1950] 2 K.B. 86; 66 T.L.R. (Pt. 1) 1031; [1950] 1 All E.R. 693.

That case concerned the sale of specific goods, namely, a picture, and Mr. Roskill argued on behalf of the buyers that whereas it might be true to say that a genuine and mutual fundamental mistake as to the quality of the specific article might not, in the absence of misrepresentation of breach of warranty, avoid the contract, the same principle did not apply in the case of a sale of unascertained goods such as were in question in the present case. He contended that where the contract was for the sale of unascertained goods, the parties do not agree upon the same subject-matter, even though they give it its correct trade description, if they are under mutual mistake as to the character or quality of the described subject-matter, provided it is a mistake of a fundamental character. He submitted that his proposition so framed was covered by a passage in the speech of Lord Atkin in *Bell* v. *Lever Brothers Ld.*[11] Considering mistake as to quality, Lord Atkin said: " Mistake " as to quality of the thing contracted for raises more difficult " questions. In such a case a mistake will not affect assent " unless it is the mistake of both parties, and is as to the " existence of some quality which makes the thing without the " quality essentially different from the thing as it was believed " to be. Of course it may appear that the parties contracted " that the article should possess the quality which one or other " or both mistakenly believed it to possess."

While there are, no doubt, many cases in which proof of a mutual mistake as to a quality of a fundamental character will serve to avoid a contract of sale, it will be remembered that *Bell* v. *Lever Brothers Ld.*[11] was not a case of that sort. It was not a case which concerned the sale of goods, and I cannot think that in stating the general proposition, as he did in the passage which I have quoted above, Lord Atkin had in mind the case of the sale of goods in the way of commerce under a well-known trade description.

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[10] [1950] 2 K.B. 86, 89.

[11] [1932] A.C. 161, 218; 48 T.L.R. 133.

In this connexion I desire to quote a passage from the judgment of Denning L.J. in *Solle* v. *Butcher*.[12] In dealing with mistake which renders the contract a nullity, Denning L.J. said: "All previous decisions on this subject must now be read "in the light of *Bell* v. *Lever Brothers Ld.*[13] The correct interpretation of that case, to my mind, is that, once a contract "has been made, that is to say, once the parties, whatever "their inmost states of mind, have to all outward appearances "agreed with sufficient certainty in the same terms on the "same subject-matter, then the contract is good unless and "until it is set aside for failure of some condition on which the "existence of the contract depends, or for fraud, or on some "equitable ground. Neither party can rely on his own mistake "to say it was a nullity from the beginning, no matter that it "was a mistake which to his mind was fundamental, and no "matter that the other party knew that he was under a mistake. "A fortiori, if the other party did not know of the mistake, but "shared it."

Disputes between commercial men concerning sale by description of unascertained goods in the way of business in which no question of misrepresentation or breach of warranty arises are not common. A sale in a particular trade by a description known in that trade would ordinarily negative the possibility of mutual mistake of a fundamental character. In this particular case, while it would seem that when the trouble arose both parties thought that the commodity in which they were dealing was pure kapok, there is no finding of fact in the award that the minds of the sellers, or indeed of the buyers, were at the time of the making of the contract directed to the particular point whether the commodity in which they were dealing did or did not contain any admixture of cotton. Without any representation or warranty on the part of the sellers the buyers agreed to purchase Calcutta kapok "Sree" brand. The sellers delivered goods of the contract description. Samples were supplied by the sellers. The buyers had every opportunity of examining the samples. There is no finding that the bulk did not comply with the samples. I find it difficult to believe that a proper and timely examination of the samples by the buyers would not have revealed the admixture of cotton complained of by the buyers, and in any case there is no finding of fact in the award that this would not have been so. If manufacturers who buy their raw material in a particular trade choose to order goods, whether ascertained or unascertained, by a description or brand known in the particular trade, and goods answering to the particular description or brand are supplied, I cannot see why they should, in the absence of any misrepresentation or breach of warranty by the seller, have any cause for complaint. The seller has complied with the provisions of section 13 of the Sale of Goods Act, and that, in my view, is the extent of his liability in cases of this type.

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[12] [1950] 1 K.B. 671, 691; 66 T.L.R. (Pt. 1) 448; [1949] 2 All E.R. 1107.

[13] [1932] A.C. 161; 48 T.L.R. 133.

When goods, whether specific or unascertained, are sold under a known trade description without misrepresentation, innocent or guilty, and without breach of warranty, the fact that both parties are unaware that goods of that known trade description lack any particular quality is, in my view, completely irrelevant; the parties are bound by their contract, and there is no room for the doctrine that the contract can be treated as a nullity on the ground of mutual mistake, even though the mistake from the point of view of the purchaser may turn out to be of a fundamental character.

In the present case Mr. Roskill could not, and doubtless would not, have attempted to argue the point which he has if it had not been for the fact that the sellers, after the trouble arose, adopted a sympathetic attitude towards the buyers and wrote a number of letters to them, in which the following passages appear. In the letter of October 11, dealing with the buyers' complaint that there was an admixture of cotton, they said this: "This we realize is a very serious matter and we have "immediately telegraphed to the shippers asking for their com- "ments, which will be passed to you as soon as they are "received. In the meantime, it is noted that you are carrying "out tests and will let us have details and report at your earliest "convenience. Meanwhile, for good order's sake we have pro- "visionally claimed arbitration pending an amicable settlement. "We are extremely sorry that this has happened and can assure "you that we had no previous knowledge or intimation that "this was not pure kapok, and we can only hope your final "report will not prove as serious as it at the moment seems "probable." In a letter dated October 18, they said: "We are "very sorry that this unfortunate affair should have occurred "and to be perfectly honest with you this is the first time, as "far as we can remember, that we have had a claim of this "sort, but we can assure you that we shall do everything possible "to protect your interests." In a letter of November 29, they said: "We feel, as you do, that a false delivery has been made, "in that a mixture of cotton and kapok has been delivered "against a kapok contract."

It is, perhaps, natural that the buyers should rely on those passages and on certain other perhaps less convincing passages in the sellers' letters, but whether the minds of the sellers were at the time they made the contract in question specifically directed to the question whether Calcutta kapok "Sree" brand did or did not contain an admixture of cotton, may be doubtful. In any case, there is no finding of fact upon this point. If the sellers' minds were not directed to this point when they entered into the contract, then no question of a mutual mistake of fact arises. That, I think, is made clear in the passage in Lord Thankerton's speech in *Bell* v. *Lever Brothers Ld.*[14] when, dealing with the phrase "underlying assumption by the parties," he said: "The phrase 'underlying assumption by the parties,' "as applied to the subject-matter of a contract, may be too "widely interpreted so as to include something which one of the "parties had not necessarily in his mind at the time of the "contract; in my opinion it can only properly relate to something which both must necessarily have accepted in their minds "as an essential and integral element of the subject-matter. In "the present case, however probable it may be, we are not necessarily forced to that assumption." If I may say so (and it may not be material from my point of view in this case) I do not feel that I am necessarily forced to that assumption either.

For the reasons which I have given, and even on the assumption that there was at the time the contract was made a mutual mistake of fact by buyers and sellers as to the composition of the commodity in which they were dealing, I am satisfied that Mr. Roskill's point is unsound. In a case of this kind where the buyer mistakenly believes that goods of a known trade description have a particular composition, he has no right to relief in the absence of misrepresentation or breach of warranty by the

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[14] [1932] A.C. 161, 235.

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seller; and I can see no reason in principle why the fact that the seller may entertain the same unexpressed but erroneous belief should have any relevance when the rights of the parties come to be considered. Accordingly, I am satisfied that the questions asked by the appeal committee must be answered in favour of the sellers.

Dealing with these questions, in so far as the first question put by the appeal committee is material, I determine that the dispute between the parties was a dispute as to quality. I answer the second and third questions in the negative; and the result of this judgment must be that the buyers will pay the sellers' costs.

Judgment for sellers.

Solicitors: *Pritchard, Englefield & Co., for Aneurin Rees & Davies, Liverpool; Monro, Saw & Co.*

P. B. D.

C. C. A.

1953
Mar. 30, 31;
Apr. 1.

Lord Goddard C.J.,
Byrne and Parker JJ.

REGINA *v.* WILLIAMS.

REGINA *v.* WILLIAMS.

Criminal Law—Larceny—"Fraudulently and without a claim of "right"—Meaning—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 1 (1).

By section 1 (1) of the Larceny Act, 1916: "A person steals "who, without the consent of the owner, fraudulently and without "a claim of right made in good faith, takes and carries away "anything capable of being stolen with intent, at the time of such "taking, permanently to deprive the owner thereof":—

Held, that "fraudulently" in the section is intended to add and does add something to the words "without a claim of right," and means that the taking must be intentional and deliberate, i.e., without mistake; and that the person taking the property must know when he took it that it was the property of someone else, and must have had the intention, when he took it, of depriving the owner of the property in it.

When the property taken consists of coins or notes, the fact that the person taking them has an intention to return them or their value, coupled with an honest expectation of being able to do so, may be a matter of mitigation but affords no defence to a charge of larceny, if he is not in a position to replace them at the time, but only has a hope or expectation that he will be able to do so in the future.

Rex v. *Carpenter* (1911) 22 Cox.C.C. 618 applied.

APPEALS against conviction and sentence.

The appellants, Hywell Rhys Williams and Margaret Elizabeth Williams, his wife, were indicted at the Monmouthshire Quarter Sessions before the deputy chairman and other magistrates on an indictment containing eight counts. The first count charged them with the larceny of £40, the property of the Postmaster-General; the second count related to the larceny of £20, the third count to the sum of £43, the fourth to a sum of £100, and the fifth to a sum of £38. The sixth count charged them with stealing £544 1s. 1d. the property of the Postmaster-General, such sum including the sums which were already the subject of specific counts. The seventh count charged the appellants in the first or second degree with falsification of accounts and the eighth count charged a similar offence against the female appellant only. The jury convicted the appellants on all the counts with the exception of the second. They added a rider to their verdict that, in respect of the charges made in counts one and three, the appellants intended to repay the money and honestly believed that they would be able to do so, and that in respect of counts four, five and six, they intended to repay but had no honest belief that they would be able to do so.

The facts giving rise to the charges against the appellants were shortly as follows: The male appellant carried on a general shop in Philipstown, Tredegar, and his wife was the sub-postmistress of a post office conducted on the premises and was entirely responsible for the accounts of both the post office and the shop. The business of the shop was in difficulties, and the appellants were unable to pay the bills for the goods required for the purposes of the shop. The female appellant, with the knowledge of her husband, took money from the post office till, which was the money of the Postmaster-General, and used it for the purposes of the business of the shop. In her evidence, which was supported by that of her husband, she said that she thought that she would be able to repay the money out of her salary from the post office, and from sales in the business. The male appellant said that he knew that it was wrong to do what they had done, but that he thought that it would all come right in the end. The jury having found a verdict as set out above, the deputy-chairman passed sentences of one month's imprisonment on each of the appellants on the first count, 12 months' each on counts three, four, five and seven, and 12 months on the female appellant on count eight. On the sixth count, he passed a sentence of two-and-a-half years' imprisonment on the male appellant and of 18 months on the female appellant, all the sentences to run concurrently.

The main ground of the appellants' appeal against conviction was that the deputy chairman had misdirected the jury as to the meaning of the word "fraudulently" in section 1 (1) of the Larceny Act, 1916.[1] The court intimated that they desired argument on this point.

J. H. Buzzard for the appellants. It is submitted that in section 1 of the Larceny Act, 1916, "fraudulently" means "intending to act to the detriment of any other person against "that person's wishes." The dictum of Parke B. in *Reg.* v. *Holloway* [2] (which is quoted with approval in Russell on Crimes, 10th ed., p. 1175), that wrongful and fraudulent "probably means "without a claim of right" is obiter and does not agree with the examples given in Hawkin's 1 Pleas of the Crown 144, 145, and East 2 P.C. 661. Those examples show that an "intent to "injure" in addition to an "intent permanently to deprive" is an essential element of larceny at common law. In section 1 of the Larceny Act, 1916, some meaning must be attached to the word "fraudulently" which distinguishes it from the other ingredients of the offence of larceny set out in the section. "Fraudulently" must be given the same meaning throughout the Act. As the expressions "fraudulently" and "with intent "to defraud" are clearly interchangeable in sections 20 and 21, it follows that the same meaning should be given to both expressions. The definition of "intent to defraud" given by Buckley J. in *In re Globe and Finance Corporation* [3] is apt to cover all cases of defrauding by means of false statements or documents, but is not wide enough to cover the words "intent to defraud" as used in section 21 of the Larceny Act or the word "fraudulently" as used in sections 1 and 20 and elsewhere in the Act. It is suggested that some modification in the wording of the definition is required which retains the essence of Buckley J.'s definition, and it is submitted that the proposed definition of "fraudulently" as meaning "intending to act to the detriment of any other

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[1] Larceny Act, 1916, s. 1: "For "the purposes of this Act—(1) A "person steals who, without the con- "sent of the owner, fraudulently and "without a claim of right made in "good faith, takes and carries away "anything capable of being stolen "with intent, at the time of such "taking, permanently to deprive the "owner thereof: . . ."

[2] (1848) 3 Cox C.C. 241, 244.

[3] [1903] 1 Ch. 728, 732; 19 T.L.R. 314.

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"person against that person's wishes" achieves that object. The essential feature in Buckley J.'s definition of "intent to defraud" is the intent to act to someone else's injury, but it is submitted that detriment is a more appropriate word than injury since the latter term might tend to confuse a jury by its suggestion of physical harm. The summing-up of Channell J. in *Reg.* v. *Carpenter*[4] does not conflict either with Buckley J.'s definition or with that submitted above, since if you intend either to induce someone else to risk his money, or to risk it yourself, in circumstances in which you know that the owner would not agree to its use if he knew the true facts, then you are intending "to act to "his detriment," and in the former case you are also "intending "him to act to his own injury." If some such meaning as suggested is not to be attached to the word "fraudulently," consider the following case: a barrister who is unexpectedly called on to argue a case has to spend a night in London. Working late in chambers he remembers that he is short of cash and takes some money from the desk of a brother barrister, intending to repay it in the morning. At that moment a policeman comes in attracted by his movements. All the ingredients of larceny, apart from any meaning that can be attached to the word "fraudulently," are present. Is the barrister a thief? So far as the present appeal is concerned, the deputy chairman misdirected the jury by telling them that "fraudulently" meant intending permanently to deprive the owner of the property. The effect of the misdirection was to withdraw the issue of fraud from the jury. It is submitted, therefore, that the convictions should be quashed.

R. C. Hutton and *Anthony Gordon* for the prosecution were not called on to argue.

Lord Goddard C.J. stated the facts and continued: The court cannot but regret the way in which this case was tried below. In the first place, it would have been far better, more regular and simpler, if, instead of charging the appellants with larceny, they had been charged with fraudulent conversion. The case would then have been comparatively simple. They had simply taken post office money, for which they ought to have accounted by paying over the aggregate amount, not necessarily the same coins, by a cheque or by paying it into a bank, but they used the money for their own purposes. Unfortunately, the deputy chairman during the course of the case entered into a long discussion, to use a somewhat neutral word, with counsel for the defence, to clear his mind, as he put it, as to what the defence was. He drew counsel for the prosecution, who was reluctant at that stage to take part, into the discussion, and, during the time when one of the defendants was giving evidence, he discussed at length with counsel various points of law, definitions of fraud and what amounted to fraud, and matters of that kind. The court is glad to observe that after this had gone on for some time, one of the magistrates present protested and said that it was not desirable that that sort of discussion should go on at that stage and that it was prejudicial to the defendants. If it had not been that the appellants' own evidence made it perfectly clear that they had acted dishonestly, and that there was no real defence to the charges at all, except on one point which I will consider in a moment, this court might have taken the view that the conduct of the deputy chairman was such that it would have to quash the conviction, but we cannot say in this case that there has been any miscarriage of justice, and certainly on the falsification counts there is nothing to be said. False accounts were admittedly put forward to disguise and conceal what had been going on.

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[4] (1911) 22 Cox C.C. 618, 624.

The next thing that we wish to say is that count six ought never to have been in the indictment at all, and we therefore quash the conviction on that count, but that makes no difference because the convictions on the other counts, for reasons which I will give in a moment, will stand. Count six concerns the aggregate of the sums of money by which the appellants were short. They had already been charged in the earlier counts with the specific sums which they had taken, and this £544 is the aggregate, not merely of the amounts mentioned in the earlier counts, but of those counts and certain other moneys as well. Count six, therefore, as it turned out at the trial, is bad for duplicity, and counsel for the prosecution ought to have abandoned it and the deputy chairman ought not to have left it to the jury. It is very trite learning in criminal pleading that if a man is charged with stealing £1 in the first count of an indictment, he cannot then be charged with stealing £2 in another count if the £2 is made up in part of the £1 which has already been charged in the first count. In such a case there is obvious duplicity and, as I have already said, this case would have been far simpler if the prosecution had put forward, as they should have, that this was a case of fraudulent conversion, because difficulties may easily arise in the case of the theft of coins, which is the offence with which this case is concerned.

As I have said, the charge against the appellants is one of stealing the coins and notes, the cash—taking the money from the post office till and either putting it in the till belonging to the shop or into their pockets. We have to consider whether or not that amounts to larceny, bearing in mind that the appellants might quite properly have accounted to the Postmaster-General by paying over different coins or notes of a like amount representing the full amount of the takings. We have also to consider the question whether or not the fact that the jury have found that, in respect of the amount charged in two counts, the appellants intended to repay and had reasonable ground for believing that they could repay, affords a defence, and, in regard to the amounts charged in three other counts, whether the fact that they intended to repay but had no reasonable ground for their belief, amounts to a defence. That would, of course, leave the conviction for the offences relating to falsification of accounts still untouched since, as far as the court can see in regard to those charges, there was no possible defence at all.

The definition of larceny in section 1 of the Larceny Act, 1916, is: "A person steals who, without the consent of the "owner, fraudulently and without a claim of right made in good "faith, takes and carries away anything capable of being stolen "with intent, at the time of such taking, permanently to deprive "the owner thereof." Doubts have arisen, as appears from some judgments and from the textbooks, as to the meaning of the word "fraudulently" in that section, which is found in a codifying Act which was never intended to alter the law. What is the meaning of the word "fraudulently," and does it add anything to the words "without claim of right"? It was apparently the opinion of Parke B. in *Reg.* v. *Holloway*,[1] a case tried in 1848, that the words "wrongful" and "fraudulent" meant "without claim of right"; but I think that the first thing that should be remembered is that it is undoubtedly the law that an innocent taking and a subsequent appropriation with knowledge that the property is not the taker's does not amount to larceny. The subsequent misappropriation or conversion will not turn an innocent taking into a felonious taking for the purposes of larceny. There must first be an intention permanently to deprive the owner of his property in the goods.

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[1] (1848) 3 Cox C.C. 241.

That is the first thing. There must also be an absence of a claim of right. If a person honestly believes that he has a right to the property which he is taking, and the taking is in the vindication of, or in the exercise of, a bona fide claim of right, that person is not acting feloniously. But the statute says "fraudulently and without a claim of right," and Mr. Buzzard, quite rightly, said that it was the duty of the court to give a meaning to every word in the section.

In his argument, which gave the court considerable assistance, he submitted that the word "fraudulently" meant "intending to act to the detriment of any person against that "person's wishes." The court thinks that the word "fraudu-"lently" does add, and is intended to add, something to the words "without a claim of right," and that it means (though I am not saying that the words I am about to use will fit every case, but they certainly will fit this particular case) that the taking must be intentional and deliberate, that is to say, without mistake. The person who takes the property must know when he takes it that it is the property of another person, and he must take it deliberately, not by mistake, and with an intention to deprive the person from whom it is taken of the property in it. A very simple illustration would be that of a person who picked up a suitcase at a railway station believing that it was his. There, the taking is under a mistake and he is not taking it fraudulently. Of course, if he knows that it is not his own, as is the case with those people who haunt the railway stations for the purpose of stealing suitcases, then it is larceny; but if a person, although he is not setting up a claim of right against someone else, takes away a suitcase in the mistaken belief that it is his own, he is not acting fraudulently. We think that the word "fraudulently" in section 1 must mean that the taking is done intentionally, under no mistake and with knowledge that the thing taken is the property of another person.

A great part of the discussion in the court below took place because the defence submitted that if the appellants intended to repay and had reasonable grounds for thinking that they would be able to do so, that would be an answer. We must point out, as we did more than once in the course of the argument, that we are here concerned with the case of coins, and there is no question here that having taken the coins or the notes from the till and used them in their own business, the appellants intended permanently to deprive the Postmaster-General of those coins and notes. That is the first thing. Does it make any difference, then, that they intended to repay, which can only mean in this case that they hoped that they would be able to repay?

In considering whether this court is to give effect to the rider of the jury we must bear in mind the case which, as we have said before, is the locus classicus on this question, namely, Channell J.'s charge to the jury in *Reg.* v. *Carpenter*,[2] referred to by this court in *Rex* v. *Kritz*.[3] In that case we quoted the direction of Channell J., which was given in a charge of false pretences, but on the point of honest intention it is just as apposite in the case of larceny. Channell J. said[4]: "If the "defendant made statements of fact which he knew to be untrue, "and made them for the purpose of inducing persons to deposit "with him money which he knew they would not deposit but for "their belief in the truth of his statements, and if he was "intending to use the money so obtained for purposes different "from those for which he knew the depositors understood from "his statements that he intended to use it, then, gentlemen, we "have the intent to defraud, although he may have intended to "repay the money if he could, and although he may have "honestly believed, and may even have had good reason to "believe, that he would be able to repay it. You see it is the "fraud in the mode of getting the money, because you may by "fraud get hold of money, even if you mean to repay it, and "thoroughly believe that you can repay it—you are still "defrauding the depositor. You are not defrauding him of the "money if you eventually do repay it, but you are defrauding "the man because you are giving him something altogether "different from what he thinks he is getting, and you are getting "his money by your false statement. In such a case as that the "false statement would not be honestly made, and this question "as to the intent to defraud substantially comes to this: "whether or not the statements were honestly made." For "statements" in that case we have to substitute "actions," because the money was taken, it was not obtained by statements.

Here, the money was taken and the appellants intended to use the money for purposes different from those for which they were holding the money and for which the persons who paid the money intended it to be used, namely, for paying the Postmaster-General for stamps or postal orders, and for purposes different from those which their employer the Postmaster-General, to their knowledge, intended they should use it. Therefore, it seems to the court in this case that, by taking the actual coins and notes and using them for their own purposes, the appellants intended to deprive the Postmaster-General of the property in those notes and coins, and in so doing they acted without a claim of right and they acted fraudulently because they knew what they were doing. They knew that they had no right to take the money which they knew was not their money. The fact that they may have had a hope or expectation in the future of repaying that money is a matter which at most can go to mitigation and does not amount to a defence. Therefore, it appears to us that the appellants' own evidence shows that they were guilty of the larcenies with which they were charged. The total amount of money which the taxpayer has lost in this case is over £500, which the defendants were apparently quite unable to replace.

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[2] (1911) 22 Cox C.C. 618.

[3] (1949) 33 Cr.App.R. 169.

[4] 22 Cox C.C. 618, 624.

It remains, therefore, to consider only the question of sentence. The sentence on the woman was 18 months' imprisonment, and on the man two-and-a-half years. Why, where a man and woman are involved, it seems so often to be considered that the woman should always receive a less sentence than the man, I do not know. There are, of course, cases in which it is right that she should. In the case of a young woman stealing under the influence of a man, it is quite right that she should receive a less sentence than the man. In the present case one would have supposed that it was the woman who was by far the more to blame; she was the postmistress, she was helping herself to the money and she was using it for the business in which she was interested along with her husband. The husband seems to have been a weak sort of person who did not protest, and yet he receives a year more than the woman gets. But as the sentences of 18 months and two-and-a-half years respectively were passed on the count we have quashed, the sentences on both the prisoners on the other counts, namely, one month, 12 months, and 12 months, all concurrent, will stand, so that each prisoner will serve the same sentence of one year.

Appeal allowed on one count,
dismissed as to remainder.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

P. B. D.

KRUSE *v.* QUESTIER & CO. LD.

1953
Mar. 20.

Pilcher J.

[1952 K. No. 943.]

Arbitration—Submission—"All disputes arising out of contract"—Contract unexecuted—Alleged frustration—Jurisdiction of arbitrator to entertain dispute.

Where a contract which contains an arbitration clause in ordinary form is treated by the parties as a subsisting contract until a dispute arises which raises the question whether events which have occurred while the contract was still unexecuted have rendered the contract impossible of performance and so frustrated, such question constitutes a dispute arising out of the contract on which an award can properly be made by an arbitrator. There is no distinction in such a case between a contract which is entirely executory and one which has beeen partly executed.

Hirji Mulji v. *Cheong Yue Steamship Co. Ld.* [1926] A.C. 497; 42 T.L.R. 359 not followed.

Obiter dicta in *Heyman* v. *Darwin's Ld.* [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337 followed and applied.

ACTION: preliminary point of law.

By a contract dated July 10, 1951, the plaintiff, S. Kruse, bought from the defendants, Questier and Co. Ld., 10,000 metric tons of Iraqian barley, shipment as to 5,000 tons between September 15 and October 15, 1951, and as to the balance between October 15 and November 15. The barley had to be transported by river from the interior of Iraq to the port of shipment, and by reason of an exceptionally dry season during August, 1951, the level of the rivers in Iraq fell to such an extent that they became unnavigable by craft of even very light draught and the barley could not be brought to the port for shipment. Correspondence took place between the parties in which it was agreed that the time for shipment under the contract should be extended to include the months of December, 1951, and January, 1952. In December, 1951, the Iraq Government prohibited all further exports of barley until March, 1952.

In that state of affairs, no barley having been delivered under the contract, the buyer proceeded to arbitration under the arbitration clause in the form of contract used by the London Corn Trade Association, Iraqian and Persian Gulf Feeding Stuffs, which provided that "all disputes from time to time arising under this "contract shall be referred to two arbitrators, one to be appointed "by each party in difference or to an umpire to be appointed by "the arbitrators, if and when they disagree." The clause also provided: "(b) If one party fails to appoint and instruct an "arbitrator . . . after receipt of notice in writing requiring him "to make such appointment, the party who has served such "notice may apply to the London Corn Trade Association Ld. to "appoint an arbitrator on behalf of the defaulting party." The buyer duly appointed an arbitrator and the sellers having failed to do so, one was appointed on their behalf. The arbitrators disagreed, and eventually the umpire made an award by which he found that there was due to the plaintiff the sum of £88,857 6s. 11d. The plaintiff began an action against the defendants to enforce the award.

By their defence the defendants pleaded in paragraph 3 that, on the facts, the performance of the contract by them became impossible and/or that the contract was frustrated not later than the end of August, 1951. They further pleaded that, having regard to the terms of the contract, by reason of the prohibition by the Iraqian Government of exports of barley until March, 1952, the contract was cancelled, and that, on one or other of the above pleas, the submission to arbitration contained in the contract was nullified, with the result that the award was made without jurisdiction and was null and void. They counterclaimed for a declaration to that effect.

By his reply, the plaintiff pleaded that the award was binding on the defendants.

An order was made that the question raised on the pleadings should be tried as a preliminary point of law.

John F. Donaldson for the plaintiff. There is no authority binding on the court which decides whether an arbitrator appointed under a submission to arbitration contained in a contract, which is wholly executory, has jurisdiction to decide whether the contract has been frustrated. In *Hirji Mulji* v. *Cheong Yue Steamship Co. Ld.*[1] the Judicial Committee of the Privy Council (whose decision is not binding) held that, in the case of an executory contract, the arbitrator had no jurisdiction to decide the point. In *Heyman* v. *Darwin's Ld.*,[2] however, the House of Lords held that an arbitrator had jurisdiction to decide whether an executory contract had been determined by an accepted repudiation and, having considered the *Hirji Mulji* case,[1] expressed the view

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[1] [1926] A.C. 497; 42 T.L.R. 359.

[2] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.

(admittedly entirely obiter) that the same reasoning applied in the case of frustration. In the circumstances of the present case it is submitted that the obiter dicta in *Heyman* v. *Darwin's Ld.*[3] should be followed and applied, with the result that the plaintiff is entitled to succeed.

C. J. Bailhache for the defendants. The decision in *Heyman* v. *Darwin's Ld.*[3] did not extend to the case of a contract terminated by frustration. It is submitted, therefore, that *Hirji Mulji* v. *Cheong Yue Steamship Co. Ld.*[4] is still good law and, on the facts of the present case, should be followed in preference to *Heyman* v. *Darwin's Ld.*[3] Moreover, it was expressly provided by the contract in the present case that in the event of a prohibition of export of wheat from Iraq the contract should come to an end for all purposes. For that reason also, the arbitrator had no jurisdiction to make an award against the defendants.

PILCHER J. I have here to consider a preliminary point of law which arises between the plaintiff and the defendants in an action which concerns the purchase by the plaintiff from the defendants of a large quantity of Iraqian barley. The question of law which I have to determine is this: whether, assuming that the contract between the parties, dated July 10, 1951, is (1) frustrated as alleged in paragraphs 2 and 3 of the defence and counterclaim, and/or (2) varied and cancelled as alleged in paragraphs 4 and 5, the award dated April 16, 1952, is binding upon the defendants.

The matter arises in this way. [His Lordship stated the facts and continued:] It is on the assumption of the truth of the facts which I have stated that I am asked to determine the question of law whether, in the event of the contract of sale between the parties having been frustrated or varied and cancelled, the award made by the umpire is binding on the defendants. It is a short point, but one upon which there is little, if any, direct authority. The material words in the arbitration clause contained in the London Corn Trade Association Iraqian and Persian Gulf Feeding Stuffs Contract, which was the form of contract used in this case, provide that "All "disputes from time to time arising out of this contract," including any question of law appearing in the proceedings, shall be submitted to arbitration in the manner thereinafter prescribed.

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[3] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.

[4] [1926] A.C. 497; 42 T.L.R. 359.

The plaintiff contends that the contract, having been made, subsisted between the parties until, on the assumption of the facts which I am asked to make, it was either frustrated or cancelled, and that, with the contract, there continued to subsist the arbitration clause, and that one of the matters with which, under this form of arbitration clause, the arbitrators and umpire were empowered to deal, was the specific point whether the contract had in the particular events which occurred been frustrated or cancelled.

I think that it is common ground between the parties that in a case of this kind, if the contract which contains the arbitration clause has been partly executed, then the issue whether or not in any set of circumstances the contract has been frustrated or cancelled is one which it is proper for the arbitrators to determine. That particular point was decided in the well-known case, *Heyman* v. *Darwin's Ld.*[1] But it is said by Mr. Bailhache for the defendants, and is assented to by Mr. Donaldson for the plaintiff, that there does not appear to be any reported case in which the point has arisen whether the issue of frustration or cancellation is one which it is proper for an arbitrator to entertain under an arbitration clause where the contract is wholly unexecuted, unless it be *Hirji Mulji* v. *Cheong Yue Steamship Co. Ld.*,[2] decided by the Privy Council. That was a case in which the respondents had agreed to charter their steamship to the appellants and place her at their disposal at Singapore on March 1, 1917. Before that date arrived the vessel was requisitioned by the British Government, and consequently the owner was unable to put his vessel at the charterers' disposal. It was, therefore, a case of a contract which was wholly unexecuted. An arbitrator was appointed and the respondents were awarded damages for breach of contract. They brought an action on the award, and it was held that there had been a frustration of the charterparty which brought the whole contract to an end in 1917; and that the whole contract having gone, the submission to arbitration had also gone, with the result that the arbitrator had no jurisdiction to make the award which he did.

That was, as I say, a decision of the Privy Council, delivered by Lord Sumner, and in the course of giving the judgment he made certain observations which were stressed in argument by Mr. Bailhache. Lord Sumner said[3]: "Though a party may

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[1] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.

[2] [1926] A.C. 497; 42 T.L.R. 359.

[3] [1926] A.C. 510.

"exercise his right to treat the contract as at an end, as regards "obligations de futuro, it remains alive for the purpose of vindi- "cating rights already acquired under it on either side. So with "frustration. Though the contract comes to an end on the "happening of the event, rights and wrongs, which have already "come into existence, remain, and the contract remains too, for "the purpose of giving effect to them. No question of this sort, "however, arises here. The contract was wholly executory. The "ship was requisitioned before she was placed at the charterers' "disposal; the performance of the charter never began, and the "failure to begin it by tendering the ship at Singapore was "excused in the owners' favour by the excepted restraints of "princes. Under these circumstances, by the year 1919, when "a dispute first arose, 'this charter' no longer existed. The "dispute was not one, of which it could be predicated that it was "one arising under 'this charter,' since that had terminated by "frustration a year before. An arbitration clause is not a "phœnix, that can be raised again by one of the parties from the "dead ashes of its former self."

I should, perhaps, refer to another passage from the judgment of Lord Sumner, which is in the following terms[4]: "That a person before whom a complaint is brought cannot "invest himself with arbitral jurisdiction to decide it is plain. "His authority depends on the existence of some submission to "him by the parties of the subject matter of the complaint. For "this purpose a contract that has determined is in the same "position as one that has never been concluded at all. It founds "no jurisdiction."

It was on *Hirji Mulji* v. *Cheong Yue Steamship Co. Ld.*[5] that Mr. Bailhache was, I think, compelled here to rely, because of a number of general observations made by their Lordships in *Heyman* v. *Darwin's Ld.*,[6] most if not all of which were obiter. I propose to refer as shortly as I can to those observations, because more than one of the noble Lords in *Heyman* v. *Darwin's Ld.*[6] referred to *Hirji Mulji's* case[7] and pointed out that, while the Privy Council's views on this kind of topic were to be treated with the greatest respect, they were not prepared to assent to the general principle laid down in that case. They also pointed out that a decision of the Privy Council was not binding on their Lordships' House, nor, indeed, on a court of first instance. There can be little doubt that, while it was not necessary for their Lordships in *Heyman* v. *Darwin's Ld.*[8] to deal with facts other than those which they had before them, if they had had to do so, they would have decided this case in favour of the plaintiff. It should be said that *Heyman* v. *Darwin's Ld.*[8] concerned an issue under a contract which was partly executed; I do not think that I need say more with regard to the facts than that.

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[4] [1926] A.C. 497, 502.
[5] Ibid. 497.
[6] [1942] A.C. 356.
[7] [1926] A.C. 497.

Considering the general principles involved in this type of case, Viscount Simon L.C. said[9]: "If the dispute is whether "the contract which contains the clause"—that is, the arbitration clause—"has ever been entered into at all, that issue "cannot go to arbitration under the clause, for the party who "denies that he has ever entered into the contract is thereby "denying that he has ever joined in the submission. Similarly, "if one party to the alleged contract is contending that it is "void ab initio (because, for example, the making of such a "contract is illegal), the arbitration clause cannot operate, for "on this view the clause itself also is void. But, in a situation "where the parties are at one in asserting that they entered into "a binding contract, but a difference has arisen between them "whether there has been a breach by one side or the other, or "whether circumstances have arisen which have discharged one "or both parties from further performance, such differences "should be regarded as differences which have arisen 'in "'respect of,' or 'with regard to,' or 'under' the contract, and "an arbitration clause which uses these, or similar, expressions "should be construed accordingly." I pause here to repeat that the words in the arbitration clause with which I am concerned are "disputes from time to time arising out of this contract," which I think are words of a similar character to those in the passage of the opinion of Viscount Simon, to which I have referred.

Viscount Simon continued: "By the law of England (though "not, as I understand, by the law of Scotland), such an arbitration clause would also confer authority to assess damages for "breach, even though it does not confer on the arbitral body "express power to do so. I do not agree that an arbitration "clause expressed in such terms as above ceases to have any "possible application merely because the contract has 'come "'to an end,' as, for example, by frustration. In such cases "it is the performance of the contract that has come to an end.

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[8] [1942] A.C. 356.

[9] Ibid. 366.

"The doctrine of discharge from liability by frustration has often "been explained as flowing from the inference of an implied "term, and in giving my opinion on the occasion of the recent "decision of this House in *Joseph Constantine Steamship Line* "*Ld.* v. *Imperial Smelting Corporation Ld.*[10] I expressed the "view that the most satisfactory basis upon which the doctrine "can be put is 'that it depends on an implied term in the "'contract of the parties.' If, therefore, when parties have "entered into a contract, circumstances arise before the performance of the contract is completed which, in the view of "one party, bring the contract to an end by frustration, and, "therefore, discharge both parties from further performance, but "the other party does not agree, this is a difference about the "applicability of the implied term and is just as much within "the arbitration clause as if it were a difference about an express "term of the contract."

Later, Viscount Simon said[11]: "I can see no reason "why an arbitration clause framed on the above lines should not "equally apply if the supervening event which is alleged by one "side to have effected discharge by frustration occurs after the "contract has been entered into but before the time has come "for anything to be done under the contract. Lord Dunedin's "reasoning applies equally to both cases. It is, in my opinion, "fallacious to say that because the contract has 'come to an "'end' before performance begins, the situation, so far as the "arbitration clause is concerned, is the same as though the "contract had never been made. In such cases, a binding "contract was entered into, with a valid submission to "arbitration contained in its arbitration clause, and, unless the "language of the arbitration clause is such as to exclude its "application until performance has begun, there seems no reason "why the arbitrator's jurisdiction should not cover the one case "as much as the other."

I should also refer to an earlier passage of Viscount Simon's speech, where he considers *Hirji Mulji* v. *Cheong Yue Steamship Co. Ld.*[12] Having set out shortly the facts of the case, he said[13]: "Lord Sumner's judgment contains "an elaborate and authoritative exposition of the nature of "frustration, and a contrast between the operation of frustration, "which is automatic, and the consequence of wrongful repudiation,

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[10] [1942] A.C. 154, 163.

[11] [1942] A.C. 368.

[12] [1926] A.C. 510.

[13] [1942] A.C. 356, 365.

"which depends on the choice of the other party. On this "point, the judgment has always been regarded as a pronouncement of the highest authority, but I confess to considerable "difficulty in accepting the conclusion that the dispute whether "such a requisition had frustrated the performance of the "charterparty, or whether on the other hand, the shipowner "was entitled to damages for the charterers' refusal to take "delivery of the ship when she was at length released, was not "a 'dispute arising under this charter.' Lord Sumner held "that it was not, on the ground that the execution of the con-"tract had not begun, and that the dispute first arose when "'this charter' no longer existed. A decision of the Judicial "Committee is not binding on this House—nor, indeed, on "the courts below: *Leask* v. *Scott*[14]—and, while any opinion "delivered by Lord Sumner must command the respect due to "that great master of the law, I think the judgment in *Hirji* "*Mulji's* case,[15] so far as the effect of frustration of contract on "an arbitration clause is concerned, must not be taken as having "established a general rule. Ordinarily speaking, there seems "no reason at all why a widely drawn arbitration clause should "not embrace a dispute whether a party is discharged from future "performance by frustration, whether the time for performance "has already arrived or not."

Lord Macmillan, considering the case of *Hirji Mulji*,[15] said[16]: "It remains to mention the special case of a contract "which has been frustrated, in the technical sense which that "word has now acquired. In the *Hirji Mulji* case[15] it was held "in the Privy Council that, where a contract had been frustrated "before performance had begun in consequence of a government "requisition, the contract had terminated as to all matters and "disputes which had not already arisen and the arbitration "clause had ceased to be operative. I do not propose to express "any opinion as to the effect of frustration in the technical "sense on arbitration clauses, as the matter has not been fully "argued, but I should not like to be taken as accepting without "further consideration some at least of the views expressed by "Lord Sumner on behalf of the Board in the case just quoted." He concluded his speech by saying: "I have only to add that "having had the advantage of reading in print the speech of my "noble and learned friend the Lord Chancellor, I desire to

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[14] (1877) 2 Q.B.D. 376, 380.

[15] [1926] A.C. 497.

[16] [1942] A.C. 375.

"express my agreement with the general conclusions which he "has reached."

Lord Wright said[17]: "As at present advised I find it "difficult to distinguish a dispute where there is a claim for "damages and the defence set up is that the contract is frustrated from any other defence, or to understand why such a "dispute should be outside a submission of disputes *under* the "contract. It is, no doubt, less difficult to treat these questions "as falling within a submission of disputes arising *out of* or *in* "*relation* to a contract, but I do not think such differences in "words should be decisive. It is certainly desirable, if possible, "to have broad and simple rules in these matters. Frustration, if "it occurs, no doubt, puts an end to the contract for the future "as much as does rescission after repudiation or any other whole "breach, though in that case there is a claim for damages for "the breach while in respect of frustration there is no claim for "damages. The dispute in all such cases where frustration is "alleged is whether there has been frustration at all, and such a "dispute would seem logically to arise 'under the contract' and "to fall within the submission just as much as if the words had "been 'arising out of it.'" Lord Wright also agreed with the general conclusions summarized by the Lord Chancellor.

Lord Porter dealt with the matter as follows[18]: "Meanwhile, "I think it essential to remember that the question whether "a given dispute comes within the provisions of an arbitration "clause or not primarily depends on the terms of the clause "itself. If two parties purport to enter into a contract and a "dispute arises whether they have done so or not, or whether "the alleged contract is binding on them, I see no reason why "they should not submit that dispute to arbitration. Equally "I see no reason why, if at the time when they purport to make "the contract they foresee the possibility of such a dispute "arising, they should not provide in the contract itself for the "submission to arbitration of a dispute whether the contract ever "bound them or continues to do so. They might, for instance, "stipulate that, if a dispute should arise whether there had been "such fraud, misrepresentation or concealment in the negotiations between them as to make an apparent contract voidable, "that dispute should be submitted to arbitration. It may "require very clear language to effect this result, and it may be "true to say that such a contract is really collateral to the

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[17] [1942] A.C. 375, 383.

[18] Ibid. 392.

"agreement supposed to have been made, but I do not see why "it should not be done. Indeed, the possibility of providing for "such an arbitration and the difficulty of giving sufficiently "precise expression to bring about the required result are both "visualized by Lord Sumner in *Hirji Mulji* v. *Cheong Yue* "*Steamship Co. Ld.*,"[19] and he cited a passage from the judgment of the Privy Council.

Later in his speech, having considered *Scott & Sons Ld.* v. *Del Sel*,[20] he said[21]: "So far as *Hirji Mulji* v. *Cheong Yue* "*Steamship Co. Ltd.*,[22] which is not binding, lays down a "different principle, I do not think it should be followed despite "the authority which it undoubtedly possesses." There are other passages which I could have quoted from the speeches of the noble Lords in *Heyman* v. *Darwin's Ld.*,[23] but I am conscious of having perhaps said rather too much about that case.

I have no doubt whatsoever that, unassisted by the observations of the noble Lords in *Heyman* v. *Darwin's Ld.*,[23] I should have concluded myself that where you have a contract containing an arbitration clause and the contract is treated by the parties as a subsisting contract until a dispute arises, and the dispute is a dispute whether or not at some time after the contract was entered into, events have occurred which justify one or other party contending that the contract has become impossible of performance and so frustrated, it is essentially a point which, in the absence of specific agreement between the parties, would come under the ordinary form of arbitration clause which provides that disputes under or arising out of the contract shall be referred to arbitration. That such is the case in contracts which are partly executed is clear upon authority. Having had the advantage of considering the views expressed by the noble Lords in *Heyman* v. *Darwin's Ld.*[23] with regard to the position which would have obtained had the contract with which they were concerned been wholly executory, even though such views were not necessary for the decision of the case, I naturally regard them with the greatest possible respect, and they serve to confirm my own opinion that no distinction can properly be drawn where this point arises between a case in which the contract is entirely executory and a case in which the contract is partly executed.

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[19] [1926] A.C. 497.

[20] 1923 S.C. (H.L.) 37, 41.

[21] [1942] A.C. 401.

[22] [1926] A.C. 497.

[23] [1942] A.C. 356.

So far as the *Hirji Mulji* case [24] is concerned, I would only say this. While the decision is not binding on me, I should have hesitated long before differing from any expression of opinion by the Privy Council had I not been fortified by the very clear views expressed by the noble Lords in *Heyman* v. *Darwin's Ld.*[25] In the circumstances, however, I have no hesitation whatsoever in following the observations of their Lordships, although obiter, in that case, rather than the decision in *Hirji Mulji* v. *Cheong Yue Steamship Co. Ld.*[25] in so far as it is based on facts which are not distinguishable from the facts of the present case. I therefore answer the first question that is put to me as follows: the award in so far as it deals with frustration is binding on the defendants.

There is a second point, with which I propose to deal very shortly, and that is the point based on prohibition of export. There is a clause in the standard form of contract which provides as follows: " Should the fulfilment of this contract be rendered " impossible by prohibition of export, this contract, or any unful- " filled part thereof, to be cancelled." I do not think that I need do more than state my conclusion on that point. In this case, on the assumption that after the contract period of shipment had been prolonged there was a prohibition of export and after that prohibition came into force it was impossible for the sellers to export the barley in question, they point to the contract and say: " Look at the clause dealing with prohibition. We contend " that we are absolved under our contract from making any ship- " ment under that clause." It seems to me that it is quite impossible for the sellers to affirm the contract by relying on one of its clauses and then in the next breath to say that the contract has been cancelled in such a fashion that it is not open to either party to invoke the arbitration clause. I do not propose to say any more about it than that. I am quite clear that the question whether or not there was here a prohibition was one which was proper to be dealt with by the umpire under the award. For the above reasons there will be judgment for the plaintiff with costs on the claim and the counterclaim will be dismissed.

Judgment for plaintiff.

Solicitors: *Thomas Cooper & Co.; Arthur Blackman, Hailey & Co.*

P. B. D.

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[24] [1926] A.C. 497.

[25] [1942] A.C. 356.

C. C. A.

1953
Mar. 24, 30.

Lord Goddard C.J., Byrne and Parker JJ.

REGINA *v.* BASS.

Criminal Law—Evidence—Judges' Rules—Confession obtained while in custody and without caution—Admissibility—Direction to jury—Police officers' testimony—Credibility—Refusal to allow jury to examine police notebooks—Judges' Rules, r. 3.

The appellant was convicted upon indictment of shopbreaking and larceny. The only evidence against him was contained in statements amounting to a confession of guilt which he was alleged to have made, before he was charged, in the course of an interrogation by two police officers at a police station. At the trial it was submitted that the appellant had been in custody at the time when the interrogation took place, that he had not been cautioned, and that his statements had therefore been obtained in contravention of rule 3 of the Judges' Rules. It was also alleged that the statements had not been made voluntarily. The deputy chairman held that the statements had not been obtained improperly and were admissible.

The two police officers who had interrogated the appellant gave evidence and read their accounts of the interview from their notebooks. As these accounts appeared to be identical, and the officers denied that they had been prepared in collaboration, counsel for the appellant asked that the jury should be allowed to inspect the notebooks, but his application was refused. On appeal against conviction:—

Held, allowing the appeal, first, that the evidence established that when the appellant was questioned he was in custody and had not been cautioned, and the statements made by him had therefore been obtained in contravention of rule 3 of the Judges' Rules; and that, although, where the rules had not been complied with, statements might nevertheless be admitted in evidence provided that they had been made voluntarily, yet, if they are admitted, there must be a clear direction to the jury to reject them unless they are satisfied that they were voluntary, and since in this case there had been no such direction, the conviction must be quashed.

Rex v. *Voisin* [1918] 1 K.B. 531; 34 T.L.R. 263; 13 Cr.App.R. 89, applied.

Held, secondly, that the credibility and accuracy of the police officers was a vital matter, for it was upon their evidence alone that the case against the appellant rested; and, the police officers having denied collaboration in the preparation of their notes, the jury should have been allowed to inspect the notebooks.

Conviction quashed.

Semble. There is no reason why two police officers who have been present at an interview with a third person should not collaborate in preparing their notes to make sure that they have a correct version of what was said.

[Reported by Mrs. E. M. Wellwood, Barrister-at-Law.]

C. C. A.
1953

REGINA
v.
BASS.

APPEAL against conviction.

The appellant, Ronald Dennis Bass, was convicted at London Sessions before the deputy chairman and a jury on an indictment in which he and two other men, who both pleaded guilty, were charged with breaking and entering a shop and stealing a quantity of tea, cigarettes and chocolate.

In October, 1952, police officers, armed with a search warrant, called at the appellant's house and searched it, but found nothing to connect him with the theft for which he was subsequently charged. Some days later, in consequence of information received from the appellant's co-defendants and a police informer, two of the officers decided to interview the appellant, and in response to a message left at his house he called at Paddington police station, where he was invited by the two police officers to go into the C.I.D. room, and an interview took place there lasting three-quarters of an hour. During that interview he made statements which amounted to a confession of guilt.

At the trial it was submitted by counsel for the appellant that the statements which the appellant was alleged to have made had been obtained from him while he was in custody and before he was cautioned and thus in contravention of rule 3 of the Judges' Rules,[1] and also that they had not been made voluntarily. After the police officers had been cross-examined and the appellant had given evidence as to the circumstances in which the statements had been made, the deputy chairman held that they were admissible and that there had been nothing improper in the way in which they had been obtained.

The two police officers who gave evidence read from their notebooks accounts of the interview in which the alleged statements had been made. The accounts were almost identical, but both officers denied collaborating in their preparation. Counsel for the appellant asked that the notebooks should be exhibited so that the jury might be allowed to examine them. His application was refused. The appellant, with the leave of the court, appealed against conviction.

F. Petre Crowder for the appellant. The answers given by the appellant to the police officers should not have been admitted in evidence because the circumstances in which they were obtained amounted to a contravention of rule 3 of the Judges' Rules and because they were not made voluntarily. The appellant went to the police station and into the C.I.D. room at the request of the police, but the police officers admitted that if he had not gone voluntarily into the C.I.D. room he would have been taken there by force and would not have been allowed to leave of his own free will. Therefore he was in custody. The answers the appellant gave to the police officers were only made in the course of an interrogation in the C.I.D. room which lasted three quarters of an hour. It was held in *Rex* v. *Winkel* [2] that the police have no right to cross-examine a man once he is in custody.

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[1] Judges' Rules, r. 3: "Persons "in custody should not be questioned "without the usual caution being first "administered."

[LORD GODDARD C.J. I think the judge went too far in that case.]

[BYRNE J. Have you considered the case of *Rex* v. *Voisin?* [3] That decision covers the first point. The Judges' Rules are only administrative in character and, whether a man is in custody or not, what he says is admissible in evidence provided it is firmly established that it was said voluntarily.]

[LORD GODDARD C.J. A judge can in his discretion rule out evidence if he is of opinion that the Judges' Rules have been infringed, but the police must investigate matters of this kind: see *Haydon Wattam, per* Oliver J.[4]]

It is submitted that in this case the investigation was carried too far.

The deputy chairman was wrong in refusing to allow the jury to see the police officers' notebooks. Their notes of the interview were prepared afterwards and were almost identical, but both officers denied that they had collaborated in preparing them. If the jury had been allowed to see the notebooks and had formed the view that the police officers, in denying collaboration, had been untruthful, that might have affected the jury's view of the credibility and accuracy of the police officers' account of the interview. There being no other evidence against the appellant the jury might have inclined in his favour.

Sir John Cameron for the Crown. It must be conceded that the deputy chairman should have allowed the jury to see the notebooks, but his refusal did not lead to a miscarriage of justice.

[LORD GODDARD C.J. The court is of the opinion that the jury should have been allowed to see the notebooks.]

The appellant was not under arrest when he arrived at the police station. The deputy chairman did not take the view that his moving into the C.I.D. room put him in custody. The police officers would have regarded his refusal to be questioned, or to go into the C.I.D. room, as something which would make it necessary to arrest him. The police officers' admission dealt with hypothetical questions which never in fact arose. As there was no evidence on which to charge the appellant it can properly be said that the actual moment when he changed from being at liberty to being in custody never arrived.

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[2] (1911) 76 J.P. 191.

[3] [1918] 1 K.B. 531; 34 T.L.R. 263; 13 Cr.App.R. 89.

[4] (1952) 36 Cr.App.R. 72, 77.

The question whether the confession was made voluntarily or not was left to the jury. It is admitted that the deputy chairman in his summing-up did not actually tell the jury that they must be satisfied that the statements were made voluntarily, but the words he used came sufficiently close to that.

Crowder was not called upon to reply.

Cur. adv. vult.

March 30. Byrne J. delivered the judgment of the court. The court has already intimated that this appeal is allowed and the conviction quashed, and we now proceed to give our reasons.

The appellant was convicted at the London Sessions on an indictment in which he and two other men, who both pleaded guilty, were charged with breaking and entering a shop and stealing a quantity of tea, cigarettes and chocolate. The case against the appellant rested entirely upon answers which he made to questions put to him by two police officers who interrogated him for about three-quarters of an hour at Paddington police station. Those answers amounted to a confession of guilt, but after the officers had been cross-examined and the appellant had given evidence as to the circumstances in which they were made, the deputy chairman held that they were admissible and that there was nothing improper in the way they had been obtained. [His Lordship stated the facts and continued:] Mr. Crowder, who appeared for the appellant in this court, and in the court below, asked detective constable Butler: "(Q.) The truth of "the matter was this, was it not, that you had no intention of "cautioning him until you had wrung from him the admission "you required? (A.) I did not caution him until such time as "he admitted the offence. (Q.) Exactly. It took you three-"quarters of an hour in one room with the door shut? (A.) Yes. "We may have discussed something else as well. (Q.) Would "you agree that, to all intents and purposes, he was under arrest? "(A.) No. (Q.) If he had tried to go, would you have prevented "it? (A.) He did not try to go. (Q.) If he had, you would have "done? (A.) Yes. (Q.) If he had refused to go to the C.I.D. "room, you would have taken him there by force? (A.) Yes."

There can be no doubt, having regard to that evidence, that the appellant was in custody; that he was questioned without being cautioned and that there was thus a breach of rule 3 of the Judges' Rules. If the deputy chairman had held—as we think that he should have done—that the statement was taken in contravention of the Judges' Rules, it would have been open to him in his discretion to have refused to admit it. On this matter he did not exercise any discretion because, erroneously as we think, he considered that the rules had not been contravened.

That, however, is not an end of the matter, for this court has said on many occasions that the Judges' Rules have not the force of law but are administrative directions for the guidance of the police authorities. That means that if the rules are not complied with, the presiding judge may reject evidence obtained in contravention of them. If, however, as *Rex* v. *Voisin*[1] shows, a statement is obtained in contravention of the Judges' Rules, it may nevertheless be admitted in evidence provided that it was made voluntarily. The principle to be applied was laid down in *Reg.* v. *Thompson*,[2] as approved in *Ibrahim* v. *Rex*.[3] In the latter case Lord Sumner said: "It has long been established as "a positive rule of English criminal law, that no statement by "an accused is admissible in evidence against him unless it is "shown by the prosecution to have been a voluntary statement, "in the sense that it has not been obtained from him either by "fear of prejudice or hope of advantage exercised or held out by "a person in authority. The principle is as old as Lord Hale."

It is to be observed, as this court pointed out in *Rex* v. *Murray*,[4] that while it is for the presiding judge to rule whether a statement is admissible, it is for the jury to determine the weight to be given to it if he admits it, and thus, when a statement has been admitted by the judge he should direct the jury to apply to their consideration of it the principle as stated by Lord Sumner,[5] and he should further tell them that if they are not satisfied that it was made voluntarily, they should give it no weight at all and disregard it. Unfortunately, the deputy chairman did not give a clear direction to the jury with regard to that aspect of the matter. He told them that they must be sure that it was a genuine confession, and that they must decide whether the officers had threatened that the appellant would not be given bail unless he talked, but he omitted to tell them in plain words that unless they were satisfied that it had been made voluntarily they should reject it and—in view of the fact that it was the only evidence against the appellant—acquit him.

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[1] [1918] 1 K.B. 531; 34 T.L.R. 263; 13 Cr.App.R. 89.

[2] [1893] 2 Q.B. 12; 9 T.L.R. 435.

[3] [1914] A.C. 599, 609; 30 T.L.R. 383.

[4] [1951] 1 K.B. 391; 66 T.L.R. (Pt. 2) 1007; [1950] 2 All E.R. 925; 34 Cr.App.R. 203.

[5] [1914] A.C. 599, 609.

In one passage of the summing-up he said: "There it is. "The chief ground of complaint, it seemed to me, was that the "young man was not cautioned earlier. After some 30 years' "experience in the criminal courts of this country, there is "nothing that I know of to prevent an officer questioning a man "in the way that they did, and if I had thought that there was "anything improper about it at all I would not have hesitated "for one second to have said so, and I should have ruled that "statement out and that would have been the end of the case. "But there it is; it is in, and Mr. Crowder has to admit that "it is in because he has to accept my ruling," and that was followed by another passage in which he said: "There was a "long discussion and talk about the question of comparing "notes, the question whether they were made independently or "whether they had been made in concert, and so on. The "question of threats was raised; 'If you don't talk you won't "'have bail,' and so on. It was put to the officers that Bass, "when he went into the box, would swear that that threat was "made, and it is entirely a matter for you to decide whether you "think that those police officers did utter that threat and that "the defendant is telling the truth, or whether you think that "the officers are telling you the truth when they deny that any "such threat was made. That is essentially a point for the "jury; it is entirely a matter for you to consider. If the threats "were made it would be most improper, and that would be "sufficient in itself to rule out the whole of those statements "and I would not have any hesitation in doing it. It is one of "those things we will not tolerate in this country, any attempt "to extract admissions, 'wring them'—as we have heard with "almost monotonous regularity—'Did you wring from him . . . ?' "and so on. Do you see any evidence of wringing from anybody? "Perhaps 'obtaining' would be a better word, and perhaps a "more polite word. But there it is. Was there any wringing? "Was there any threat uttered or was it just an ordinary "questioning of a man who was under certain suspicion? That "is what it comes to."

The jury may well have thought, in view of those observations, that they were being asked to decide a matter which had already been decided by the deputy chairman. This was a case in which police officers, without any evidence, had interviewed the appellant, and, without first administering a caution, had obtained a confession from him, and that confession was the only evidence that the prosecution had against him. If, in the circumstances of this case, the deputy chairman had, in the exercise of his discretion, refused to admit the confession, we should not have been surprised. As, however, he admitted it, we feel that the vital question whether it was made voluntarily was not adequately left to the jury.

With regard to the second ground of appeal, the matter stood in this way. The officers' notes were almost identical. They were not made at the time of the interview. One officer made his notes after the appellant had been charged, and the other officer made his an hour later. Mr. Crowder suggested to the officers in cross-examination that they had collaborated. They denied that suggestion. This court has observed that police officers nearly always deny that they have collaborated in the making of notes, and we cannot help wondering why they are the only class of society who do not collaborate in such a matter. It seems to us that nothing could be more natural or proper when two persons have been present at an interview with a third person than that they should afterwards make sure that they have a correct version of what was said. Collaboration would appear to be a better explanation of almost identical notes than the possession of a superhuman memory.

In view of the denial of collaboration, Mr. Crowder asked the deputy chairman to allow the jury to see the officers' notebooks, but he refused, and the following passage occurred: " (Q.) You " do not think that there is anything extraordinary—the jury " will have the advantage of seeing those notebooks. . . . (The " deputy chairman:) That is if I allow it, Mr. Crowder. I am " not disposed to let juries see police officers' notebooks. Some- " times they can contain matters of the highest confidential " nature, and I do not encourage it in the least; in fact, I like " counsel to refer to only the few pages of the notebook affecting " the particular case. I do not like them out of police officers' " hands very long. I notice that you have had them in your " hands now about half an hour or so. (Mr. Crowder:) Is your " Lordship suggesting that I will alter them in any way? (The " deputy chairman:) No. I am suggesting nothing of the sort.

"I was only suggesting the view I took about police officers' "notebooks, and I do not like them out of their hands. I have "known cases where their notebooks have been taken away with "notes that they made many months before and then they "cannot remember them and they have been criticized for it. "I do not like that. (Mr. Crowder:) My Lord, I would submit "in this case that those officers, whose notes are the same, have "in fact written them . . . (The deputy chairman:) I know—"that they made them in collaboration. If I have heard that "suggestion made once I have heard it made a hundred times; "and my usual comment to the jury is: 'Yes, if they collaborate "'that is wrong; if there is a difference between the two officers' "'stories or accounts of an interview that is wrong because "'there are discrepancies; so we must have the best of both "'worlds.' That is what I will tell the jury today. I think, if "you do not mind, I would like that notebook handed back to "the officer. (Mr. Crowder:) Certainly. I ask formally that "both these notebooks, as they have been used in evidence by "the officers, be exhibited as exhibits in this case. (The deputy "chairman:) Well, I refuse. I want them handed back to the "officers as soon as possible." Thereupon the notebooks were returned to the officers.

The deputy chairman's desire to preserve the confidential nature of the notebooks could probably quite easily have been achieved with the assistance of a pin or a piece of sticking plaster so that only the relevant pages could have been read. Be that as it may, however, the jury should have been permitted to see the notebooks. The credibility and accuracy of the two police officers was a vital matter, for it was upon their evidence, and their evidence alone, that the whole of the case against the appellant rested, and as they had denied collaboration in the making of their notes, the jury should have been given the opportunity of examining them. Had this been the only ground of appeal we might have considered applying the proviso—but in view of the other matters with which we have dealt we felt obliged to quash the conviction.

Appeal allowed.

Solicitors: *Philip Conway, Thomas & Co.; Solicitor for the Metropolitan Police.*

C. A.

1953
Apr. 14, 15.

Singleton, Jenkins and Morris L.JJ.

FINNEGAN *v.* CEMENTATION CO. LD.

[1952 F. No. 1169.]

Practice and Procedure—Competency of proceedings—Master and servant—Fatal accident to workman—Action by widow against employers under Fatal Accidents Acts—Letters of administration taken out in Eire but not in England—Claim by widow as administratrix—No representative capacity—Action a nullity—Fatal Accidents Act, 1846 (9 *&* 10 *Vict. c.* 93), *ss.* 1, 2, 3*—Fatal Accidents Act,* 1864 (27 *&* 28 *Vict. c.* 95), *s.* 1.

A workman having lost his life in an accident in the course of his employment, his widow sued the employers for damages under the Fatal Accidents Acts. She had taken out letters of administration in Southern Ireland, where the accident occurred, but omitted to take out letters of administration in England. By the indorsement on the writ the plaintiff's claim was expressed to be as administratrix of her husband's estate on behalf of the dependants of the deceased; and by the statement of claim, which was delivered with the writ, the plaintiff was described as "the widow "and administratrix" of the deceased, suing "for the benefit "of the dependants of the deceased . . . and of his estate." On a summons issued by the defendants a master set aside the writ and all subsequent proceedings in the action on the ground that the plaintiff had no title to administer or sue in England as administratrix of her husband, and the order of the master was affirmed by Parker J. on appeal to him in chambers. On appeal:—

Held, that the plaintiff, having obtained letters of administration only in Southern Ireland, could not be regarded as administratrix in England for the purposes of section 2 of the Fatal Accidents Act, 1846; that the indorsement on the writ clearly showed that the action was brought in the capacity of administratrix of the estate of the deceased; and that the statement of claim was neither an extension nor a modification of the indorsement, the words "widow and" being no more than a description of the plaintiff as one entitled to damages if her action succeeded. Therefore the action, being brought in a representative capacity which the plaintiff did not possess, had been properly set aside on the ground of incompetence, and, the limitation period of 12 months having run out, she had no remedy.

Hilton v. *Sutton Steam Laundry* [1946] K.B. 65; [1945] 2 All E.R. 425; *Ingall* v. *Moran* [1944] K.B. 160; 60 T.L.R. 120; [1944] 1 All E.R. 97; and *Burns* v. *Campbell* [1952] 1 K.B. 15; [1951] 2 T.L.R. 1007; [1951] 2 All E.R. 965 applied.

Stebbings v. *Holst & Co. Ld.* [1953] 1 W.L.R. 603; [1953] 1 All E.R. 925; and *Hill* v. *Luton Corporation* [1951] 2 K.B. 387; [1951] 1 T.L.R. 853; [1951] 1 All E.R. 1028 distinguished.

Per Singleton L.J.: These technicalities are a blot upon the administration of the law, and everyone except the successful party dislikes them. They decrease in numbers as the years go on, and

> I wish that I could see a way around this one. I do not know why the Fatal Accidents Act of 1846 contained a provision that the action must be brought within a year of the death. There is no such limiting period in the case of an injury, however serious . . . If the plaintiff had sued merely as the widow of her husband the point which is now raised could not have been taken.

APPEAL from Parker J.

Patrick Joseph Finnegan, the husband of the plaintiff, Mrs. Josephine Finnegan, was a workman employed by the defendants, the Cementation Co. Ld., a British company, which was engaged in carrying out a contract in connexion with the River Erne scheme near Ballyshannon in the county of Donegal. He was assisting in the dismantling of a gantry and, on January 16, 1952, while so engaged, he fell through an opening in the floor of the gantry and sustained such injuries that six days later he died. On May 6, 1952, the widow took out in Eire letters of administration of her husband's estate, and on June 10 she issued a writ in England, the indorsement on which was: " The plaintiff's claim " is as administratrix of the estate of Patrick Joseph Finnegan, " deceased, for damages under the Fatal Accidents Acts on behalf " of the dependants of the said Patrick Joseph Finnegan, against " the defendants for the negligence of themselves, their servants " or agents, as a result of which the deceased lost his life and " his dependants suffered damage." The statement of claim, which was delivered with the writ on June 13, 1952, stated, in para. 1: " The plaintiff is the widow and administratrix of Patrick " Joseph Finnegan (hereinafter called the deceased) and she " brings this action for the benefit of the dependants of the " deceased under the Fatal Accidents Acts, 1846-1908, and for " the benefit of the deceased's estate."

No letters of administration were taken out by the plaintiff in England, and on February 12, 1953, the defendants, who had delivered a defence on August 7, 1952, issued a summons asking for an order " that the writ of summons commencing this action " and all subsequent proceedings herein be set aside on the ground " that the plaintiff had no title to administer in England or to " sue in England as administratrix of Patrick Joseph Finnegan " deceased." Master Baker granted the order asked for, and on appeal to him Parker J. upheld the master's order.

The plaintiff now appealed.

Beney Q.C. and *A. Rankin* for the plaintiff. The two points which arise are (1) whether the plaintiff, who has had letters of administration granted to her in Dublin, can properly sue in England as administratrix, (2) whether on the face of the pleadings she is suing both in her capacity as widow, under the Fatal Accidents Acts, and as administratrix of her husband's estate, or solely as administratrix. If she cannot sue as administratrix in England unless she has a grant in this country, then the question is whether she nevertheless can sue as widow under the Fatal Accidents Acts, in which case the absence of a grant in this country would be no bar on the facts as they appear in the pleadings. Parker J., having affirmed the order of the master, and 12 months having expired since the accident, the plaintiff has no remedy if these proceedings be set aside. It is submitted, however, that the words " and administratrix " in para. 1 of the statement of claim should be regarded as surplusage and the action be treated as brought by the plaintiff in her capacity as widow for damages under the Fatal Accidents Acts, on behalf of herself and other dependants of the deceased.

Stebbings v. *Holst & Co. Ld.*[1]; *Hill* v. *Luton Corporation*[2]; *Hilton* v. *Sutton Steam Laundry*[3] referred to.

Stephen Chapman for the defendants. If a plaintiff purports to sue as administrator, and he has no title to sue in that representative capacity, the action is a nullity and should be struck out: see *Burns* v. *Campbell.*[4] The plaintiff asserts, by the indorsement on the writ, that she is suing as administratrix, and the period of six months required by section 1 of the Act of 1864 not having elapsed it is impossible to construe the writ as being a claim brought in a personal capacity. Nor is it possible for the court to treat the indorsement as cured by the statement of claim. The title of the action indicates that the plaintiff is purporting to sue in a representative capacity, and the insertion of the word " widow " in the statement of claim is merely a compliance with the requirement that she should state her position, whether married woman, spinster or widow.

[JENKINS L.J. If the writ when issued was a nullity it could not be cured by a subsequent statement of claim.]

I respectfully agree. There was nothing irregular about the indorsement, and the statement of claim merely set out in full the nature of the claim indicated by the writ. If part of a case is pure surplusage the judge is not debarred from doing justice, but where a claim under the Fatal Accidents Acts is wrapt up with another claim which can only be maintained on the basis of a representative capacity the judge ought not to treat the action as one brought under Lord Campbell's Act. The mere fact that writ and statement of claim are delivered together does not require them to be construed together by the defendant. The statement of claim should be construed as in conformity with the indorsement on the writ. The law is bound to be technical when it is a matter of title to sue, and is bound to insist that a person who brings an action shall have a proper title to sue. *Stebbings* v. *Holst & Co. Ld.*[5] is distinguishable from the present case. *Hill* v. *Luton Corporation*[6] was based on curing an irregularity. *Hilton* v. *Sutton Steam Laundry*[7] is in substance on all fours with the present case, as Parker J. held.

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[1] [1953] 1 W.L.R. 603.

[2] [1951] 2 K.B. 387.

[3] [1946] K.B. 65.

[4] [1952] 1 K.B. 15.

Rankin in reply. It is submitted that the writ should not be regarded as a separate document. Writ and statement of claim being delivered together they take effect as a special indorsement.

SINGLETON L.J., having stated the facts and read sections 1, 2 and 3 of the Fatal Accidents Act, 1846, and section 1 of the amending Fatal Accidents Act, 1864,[1] continued: The result of the amendment made by the Act of 1864 is that if there be no

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[5] [1953] 1 W.L.R. 603.

[6] [1951] 2 K.B. 387.

[7] [1946] K.B. 65.

[1] Fatal Accidents Act, 1846, s. 1: "Whensoever the death of a person "shall be caused by wrongful act, "neglect, or default, and the act, "neglect, or default is such as would "(if death had not ensued) have "entitled the party injured to main-"tain an action and recover damages "in respect thereof, then and in every "such case the person who would "have been liable if death had not "ensued shall be liable to an action "for damages, notwithstanding the "death of the person injured, and "although the death shall have been "caused under such circumstances as "amount in law to felony."

S. 2: ". . . every such action shall "be for the benefit of the wife, hus-"band, parent, and child of the per-"son whose death shall have been so "caused, and shall be brought by and "in the name of the executor or ad-"ministrator of the person deceased."

S. 3: "Provided always, that "not more than one action shall lie "for and in respect of the same "subject matter of complaint; and "that every such action shall be com-"menced within 12 calendar months "after the death of such deceased "person."

Fatal Accidents Act, 1864, s. 1: "If and so often as it shall happen "at any time or times hereafter, in "any of the cases intended and pro-"vided for by the said Act, that there "shall be no executor or administra-"tor of the person deceased, or that "there being such executor or ad-"ministrator no such action as in the "said Act mentioned shall within six "calendar months after the death of "such deceased person as therein "mentioned have been brought by "and in the name of his or her "executor or administrator, then and "in every such case such action may "be brought by and in the name or "names of all or any of the persons "(if more than one) for whose benefit "such action would have been, if it "had been brought by and in the executor or administrator of the deceased's estate, it is open to a person who would benefit under the provision of the Act to bring an action instead of the action being brought by the executor or administrator.

The summons in this case was issued by the defendants on February 12, 1953, and it asked for an order " that the writ of " summons commencing this action and all subsequent proceed- " ings therein be set aside on the ground that the plaintiff has no " title to administer in England, or to sue in England, as " administratrix of Patrick Joseph Finnegan deceased and that " the plaintiff " be ordered to pay " the defendants their costs " of this action." The summons was accompanied by an affidavit of Mr. Ewing, managing clerk to the defendant's solicitors, which sets out in para. 1: " On the instructions of my principals I did " on the 29th day of January, 1953, attend at the Principal " Probate Registry, Somerset House, Strand, London W.C.2 " and made search and found no record of a grant of probate or " letters of administration of the estate of Patrick Joseph " Finnegan, deceased, being obtained in the Principal Probate " Registry from 1st day of January, 1952, to 28th day of January, " 1953, inclusive." It is common ground that no letters of administration have been granted to the plaintiff in this country.

An affidavit was sworn by Mr. Kent, partner in the plaintiff's firm of solicitors, in which he deposed to the fact that the defendants' solicitors had asked some considerable time earlier to see the letters of administration, and in para. 12 of that affidavit the witness deposed: " On Monday the 11th day of " August, 1952, I received a telephone call from Mr. Bernard " Wellington of the defendants' solicitors inquiring whether he " could call that day to inspect the letters of administration and " material birth, marriage and death certificates. I therefore " gave him an appointment to call at my firm's offices for that " same day at 4 o'clock in the afternoon, and then the said " Mr. Bernard Wellington in my presence inspected the letters " of administration extracted out of the Principal Probate Court " situated at Dublin, and also the birth, marriage and death " certificates of which he had previously by letter requested " inspection. Following the inspection I informed Mr. Wellington

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" name of such executor or adminis- " trator; and every action so to be " brought shall be for the benefit of " the same person or persons, and " shall be subject to the same regula- " tions and procedure, as nearly as " may be, as if it were brought by " and in the name of such executor " or administrator."

"that on the facts giving rise to the deceased's accident it did "not appear that there could be any real defence to the plaintiff's "claim." So that as far back as August 11, 1952, the defendants' solicitors had inspected the letters of administration extracted out of the Principal Probate Court at Dublin. This summons was not issued until February 12, 1953, by which time more than 12 months had elapsed from the date of the death of Mr. Finnegan. It follows that no fresh action under Lord Campbell's Act can now be successfully instituted and maintained, time having run.

Mr. Beney, on behalf of the plaintiff, the appellant, submitted to this court that the order of Parker J. setting aside the writ and all further proceedings was wrong, and that this court ought so to say. He made two points on behalf of the plaintiff. The first was that when the pleadings were examined it could be said, and properly said, that the action was brought by the plaintiff both as widow and as administratrix; that she was entitled to sue in her personal capacity as widow, and that in fact she did so, and that her action, in so far as it was based on the Fatal Accidents Acts, was good. She, as widow, claimed damages for herself and for the other dependants, it was said. The second point which Mr. Beney made was put by him in the form of a question: Is it right to say that a grant of letters of administration in Ireland is not sufficient to enable the grantee to take proceedings under the Fatal Accidents Act in the capacity of grantee? Section 2 of the Act of 1846 says that the action "shall be brought by and in the "name of the executor or administrator of the person deceased," and the submission of Mr. Beney on his second point is that the plaintiff, having obtained letters of administration in Dublin, can be regarded as administrator for the purposes of section 2 of the Act of 1846. I do not think that that submission is right. The section, when it refers to an administrator, means the person empowered by law to administer the estate of the deceased. The person who is granted letters of administration in Ireland is not a person empowered by law to administer the estate of the deceased in England. That point fails.

The first point, that the action is brought by the plaintiff both as widow and as administratrix, presents greater difficulty. I refer again to the title of the action, from which it appears that the plaintiff sues as "widow and administratrix of Patrick "Joseph Finnegan, deceased." She is not administratrix within the meaning of section 2 of the Act of 1846. I refer again to the indorsement on the writ, from which it appears clear that "the "plaintiff's claim is as administratrix of the estate of Patrick "Joseph Finnegan, deceased." There is no mention in the indorsement on the writ of the fact that she is his widow.

The statement of claim was delivered with the writ, and it is said that we ought to have regard only to the statement of claim and to look upon it under the rules as extending or modifying the claim indorsed on the writ. Para. 1 of the statement of claim is that "The plaintiff is the widow and the administratrix of "Patrick Joseph Finnegan (hereinafter called the deceased) and "she brings this action for the benefit of the dependants of the "deceased under the Fatal Accidents Acts, 1846–1908, and for "the benefit of the deceased's estate." I cannot see that that is either an extension or a modification of that which is indorsed upon the writ. The writ shows that she claims as administratrix. She believed that she was administratrix; she had taken out letters of administration in Ireland. Most unfortunately for her, those letters of administration do not enable her to act as administratrix of the estate in England. In the statement of claim she sets out that she is the widow and administratrix. The only point of stating that she is administratrix is that she is bringing the proceedings as administratrix, and it seems to me that the words "the widow and" are no more than a description of herself as widow and one entitled to damages if her action should succeed. I do not think that when the statement of claim and the writ are read together it is possible to draw an inference that she is claiming both as widow and as administratrix. She believed that she was administratrix and a person entitled to bring the action as such under section 2 of the Fatal Accidents Act of 1846, and that was the basis of her claim.

It is submitted by Mr. Beney that the fact that the plaintiff in para. 1 of the statement of claim sets out that she is the widow shows that she is claiming as widow, and consequently the words "and administratrix" are surplusage and might properly be considered as struck out of the statement of claim, and further, that we need not look at the writ in view of para. 1 of the statement of claim. I should like to be able to take that view of the position, but I find it difficult so to do. If I had found myself untrammelled by authority I might well have reached that conclusion, for it matters not to the defendants in which capacity the plaintiff sues, and no injustice would be done to anyone if this was regarded as an action by a widow and the question of administration was left out of consideration. But there have been a number of authorities which bear on this matter and which, in so far as they are decisions of this court, bind this court.

I refer now to the decision of this court in *Hilton* v. *Sutton Steam Laundry*.[2] The plaintiff, who was the sole dependant of her deceased husband, brought an action in an administrative capacity for damages under the Fatal Accidents Act in respect of his death by accident. She had not at the time when the writ was issued taken out letters of administration. It was held, "applying *Ingall* v. *Moran*,[3] that the writ was a nullity and was "not validated by the subsequent grant of administration; and "(2) that, although the action could have been brought by the "plaintiff as sole dependant in a personal capacity with the "same result, the court could not allow an amendment of the "writ and statement of claim, more than a year after the "husband's death, so as to convert the action into one brought "by the plaintiff in her personal capacity. To allow such an "amendment would deprive the defendants of the benefit of the "time limit fixed for bringing an action under the Fatal Accidents "Acts by section 3 of the Act of 1846, which prevented the "plaintiff from commencing a new action in a personal capacity."

In that case the plaintiff "issued a writ as administratrix of "the deceased's estate, claiming 'damages against the defendants "'for negligence and breach of statutory duty pursuant to the "'provisions of the Fatal Accidents Acts and the Law Reform "'(Miscellaneous Provisions) Act, 1934.'" She delivered a statement of claim on March 15, 1943, and para. 1 was as follows: "The plaintiff who is the widow of Frank John Hilton "deceased, brings this action as administratrix of the deceased's "estate for the benefit of such estate under the Law Reform "(Miscellaneous Provisions) Act, 1934, and for the benefit of her"self the sole dependant of the deceased who has suffered damage "by reason of the death of the deceased under the Fatal "Accidents Acts, 1846–1908." It is well to note the similarity between para. 1 of the statement of claim in that case and para. 1 of the statement of claim in the case with which this court is now concerned, and the argument put forward on behalf of the plaintiff was in the same terms as Mr. Beney's argument in this case.

At the bottom of page 67 of the report I find this submission made by counsel on behalf of the plaintiff: "There is special

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[2] [1946] K.B. 65; [1945] 2 All E.R. 425.

[3] [1944] K.B. 160; 60 T.L.R. 120; [1944] 1 All E.R. 97.

"ground for allowing the amendment seeing that an action under "these Acts has the same result whether the plaintiff sues in an "administrative or a personal capacity. It is only the limitation "of the time for bringing actions under these Acts to one year "from the death that prevents the plaintiff from beginning a new "action in a personal capacity." I should have said that in that case the application was for leave to amend the proceedings by striking out the claim under the Law Reform (Miscellaneous Provisions) Act and varying the claims under the Fatal Accidents Acts, so as to make it a claim by the plaintiff in a personal capacity. The master refused the leave asked for. Birkett J. affirmed the master's decision, and this court upheld the view of the judge.

Lord Greene M.R., in the course of his judgment said[4]: "If "the plaintiff had in fact held letters of administration at the "date of this writ, no difficulty would have arisen. She delivered "a statement of claim on March 15, 1943, and it is argued on her "behalf that, on the true construction of that statement of claim, "she has shifted her ground, as regards the claim under the "Fatal Accidents Act, by claiming under that Act in her personal "capacity and not in a representative capacity." The Master of the Rolls held, upon the pleading, that that was not so. He referred to the decision of the Court of Appeal in *Ingall* v. *Moran*,[5] and said: "If the principles there laid down are applic-"able to this case it would mean that the original writ here was "a nullity and could not be validated by anything that happened "afterwards, either by the alleged new basis on which the state-"ment of claim is said to have been framed, or by the grant of "letters of administration, or by any order of the court under "any of the rules of court, on the ground that it was a mere "irregularity." Later the Master of the Rolls said[6]: "If the "amendment is allowed, the action will not fail on that ground, "although, of course, it may fail on the merits. The result, "therefore, will be that if we allow the amendment we shall be "prejudicing the position of the defendants, who are, as things "stand, in the position to argue that the plaintiff's case is "irreparably lost because the action she had brought is incom-"petent, and will enable the plaintiff to set the action on its "feet. Further, if the action is incompetent the plaintiff can do "nothing, because the time for launching a new competent action

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[4] [1946] K.B. 65, 69, 71.

[5] [1944] K.B. 160.

[6] [1946] K.B. 65, 72.

" has elapsed. If then we allow this amendment, the defendants " will, in that respect, be prejudiced because they will obtain no " benefit from the limitation period laid down by the statute."

Thus it was accepted in that case that as the action stood the plaintiff could have no rights. Her only hope was an amendment of the kind sought on the application which was before the court. The judgment of the Master of the Rolls (with which du Parcq and Morton L.JJ. agreed) was that in those circumstances it would be wrong to allow the amendment. I fail to find any difference between this case as pleaded and *Hilton* v. *Sutton Steam Laundry.*[6] It seems to me that that decision binds this court and that we are bound to say that the appeal must be dismissed.

The Master of the Rolls, in *Hilton* v. *Sutton Steam Laundry,*[6] added a paragraph to which I shall refer in a moment, but I ought to point out that our attention was drawn to a case decided quite recently by Donovan J. at the Leeds Assizes—*Stebbings* v. *Holst & Co. Ld.*[7] Donovan J. was able to draw a distinction between that case, as pleaded, and *Hilton* v. *Sutton Steam Laundry.*[8]

In *Stebbings* v. *Holst & Co. Ld.*[7] " the plaintiff, who was one " of the dependants of her deceased husband, brought an action " for damages in respect of his death by accident. She had not " at the time when the writ was issued taken out letters of " administration, but described herself in the title of the action " as 'widow and administratrix' of the deceased and in the " indorsement of the writ claimed damages 'under the Fatal " 'Accidents Acts and the Law Reform (Miscellaneous Provi- " 'sions) Act, 1934, as widow and administratrix' of the " deceased. . . . The defendants contended that the writ was a " nullity. The plaintiff conceded that the writ was a nullity so " far as the claim under the Law Reform Act was concerned. As " regards the claim under the Fatal Accidents Acts " it was held " that (1) the words 'widow' and 'administratrix' in the " description of the plaintiff in the title simply described the " plaintiff's personal status and did not declare the capacity in " which she brought the action; (2) a fair and grammatical inter- " pretation of the indorsement of the writ was that the claim " under the Fatal Accidents Acts was brought by her as widow " and the claim under the Law Reform Act as administratrix;

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[6] [1946] K.B. 65, 72.

[7] [1953] 1 W.L.R. 603; [1953] 1 All E.R. 925.

[8] [1946] K.B. 65.

"alternatively, the words 'as administratrix' could be treated "as an error and disregarded."

As I have said, Donovan J. found himself able to distinguish that case from *Hilton* v. *Sutton Steam Laundry*.[8] He said, in reference to the defendants' contention[9]: "That contention, in "effect, asks me to erase the words 'as widow' from the indorsement. The words 'as widow' are wholly appropriate. The "plaintiff was the widow. She was entitled under the Act of "1864 to bring her claim as widow. She was not entitled under "the Law Reform Act to bring her claim as widow. Nevertheless, I am asked to disregard these words because they are "found in conjunction with the words 'and administratrix.' If "any words ought to be disregarded, it is these latter words, "for the plaintiff was not administratrix at the time. That being "so, it seems to me to be sense and not nonsense that the two "capacities are referred to in the indorsement, for whether or "not the claim under the Law Reform Act turned out to be "premature because of the absence of a grant of representation, "the claim under the Fatal Accidents Acts would nevertheless "still have been effectively begun by her 'as widow.' It seems "to me to be a fair and reasonable and indeed grammatical "interpretation of the indorsement that the claim under the Fatal "Accidents Acts is brought by her 'as widow' and the claim "under the Law Reform Act 'as administratrix of the estate.' "Alternatively, the proper thing to do, in my view, would be to "treat the words 'as administratrix' simply as an error and to "disregard them." That case differs from the case before this court in which the plaintiff's claim is made as administratrix of the estate, and, as I have said already, the position of administratrix is preserved in para. 1 of the statement of claim.

The passage in the judgment of Lord Greene M.R. in *Hilton's* case, to which I said I would refer, is as follows[10]: "I should "not be averse to discovering any proper distinction which would "enable this unfortunate slip to be corrected. Apart from the fact "that the solicitors for the defendants in fairness pointed out the "difficulty, there appear to me to be no merits on their side. "But the Statute of Limitations is not concerned with merits. "Once the axe falls it falls, and a defendant who is fortunate "enough to have acquired the benefit of the Statute of Limitations is entitled, of course, to insist on his strict rights. He

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[8] [1946] K.B. 65.

[9] [1953] 1 W.L.R. 603, 605.

[10] [1946] K.B. 65, 73.

"is similarly entitled to insist on the strict application of the "rule that the court will not deprive him of those rights by "allowing amendments in pleadings. In this case it seems to "me that to allow this amendment would be to deprive the "defendants of the benefit of the statute by setting the action "on its feet again, and, in effect, validating ab initio the original "representative writ. The distinction suggested between this "case and the earlier one is one which, in my opinion, does not "produce the result suggested. It is perfectly true that the "result is the same whether an action under the Acts is brought "by the personal representative or by the dependants. It does "not alter the fact that the action, looked at technically, is an "action in different capacities, and the capacity in which it is "brought must, under Order 3, r. 4, be stated in the indorsement "on the writ. That was done in this case and the plaintiff bound "herself to an action in a representative capacity which she did "not possess, and, unfortunately, she must take the con-"sequences. In the result, sorry though I am, and sorry as "Birkett J. was, to be compelled to come to this conclusion, the "appeal in my opinion must be dismissed with costs."

I would add that these technicalities are a blot upon the administration of the law, and everyone except the successful party dislikes them. They decrease in numbers as the years go on, and I wish that I could see a way around this one. I do not know why the Fatal Accidents Act of 1846 contained a provision that the action must be brought within a year of the death. There is no such limiting period in the case of an injury, however serious. This action was commenced well within the 12 months period, but it was brought by one who sued as an administratrix of the estate of her husband. She was not administratrix within the terms of the Acts, for no letters of administration in this country had been granted to her. It was thought that as she had been granted letters of administration in Eire she was a person who was entitled to sue as administratrix in this country. If she had sued merely as the widow of her husband, the point which is now raised could not have been taken. There is no prejudice of any sort towards the defendants. The action was commenced in due time, but it was in the wrong form. The plaintiff sued in the wrong capacity, and time had run before the point was raised by the defendants. She cannot now raise an action in a new capacity. I should like to say that she can do so, but this court is bound by authority, and I find myself, as

Parker J. found himself, constrained to say that the case is covered by the decision of this court in *Hilton* v. *Sutton Steam Laundry*.[11]

For those reasons, it appears to me that this appeal must be dismissed.

JENKINS L.J. I agree that this appeal fails, though I share the regret expressed by my Lord in coming to that conclusion. It seems to me to be a case in which a technical blunder has deprived the plaintiff of her remedy, although the blunder was not such as to affect the substance of the claim in any way, or to prejudice the defendants in defending the action in any degree. Nevertheless, the defendants are entitled to have their objection to the competence of the action dealt with according to law, and if the law supports their objection effect must be given to it, however unmeritorious it may appear to be.

It must be borne in mind that in enacting the Fatal Accidents Act, 1846, the legislature thought fit to impose a limitation period of 12 months. That means that a defendant in such a case is entitled to go scot-free, however negligent he may have been, unless a claim by a competent plaintiff is made in properly constituted proceedings within the prescribed period of 12 months. An action which is not properly constituted will not prevent the period of limitation from running any more than a total failure to bring any proceedings at all.

As to the law, so far as this court is concerned it seems to me to be settled by *Ingall* v. *Moran*[12] and *Hilton* v. *Sutton Steam Laundry*[13] and, I may add, *Burns* v. *Campbell*,[14] that an action commenced by a plaintiff in a representative capacity which the plaintiff does not in fact possess is a nullity, and, further, that it makes no difference that the claim made in such an action is a claim under the Fatal Accidents Acts which the plaintiff could have supported in a personal capacity as being one of the dependants to whom the benefit of the Acts extends. It follows in the present case that if the action was brought by this plaintiff in the representative capacity of administratrix of the estate of her deceased husband, and if she did not in fact possess that capacity, then her writ was a mere nullity and her claim must fail, because she omitted to pursue it in properly constituted proceedings within the prescribed period; and, the period having run, the court will not take any step to validate proceedings which were ab initio defective.

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[11] [1946] K.B. 65.

[12] [1944] K.B. 160.

[13] [1946] K.B. 65.

[14] [1952] 1 K.B. 15; [1951] 2 T.L.R. 1007; [1951] 2 All E.R. 965.

The first question is whether by virtue of the grant of administration taken out by the plaintiff in Southern Ireland she can properly be held to bear the representative capacity of administratrix of the estate of her husband for the purposes of an action in the English courts. In my view, it is reasonably plain that the answer to that question must be "No." I think that there is really no escape from the conclusion that, whatever the position may formerly have been, at all events since the separation of Eire from the United Kingdom, a grant of representation under the local law of Eire cannot be a grant for the purposes of an action in these courts.

The second question is whether on the true construction of the writ, read in conjunction with the statement of claim, this was in truth an action brought by the plaintiff in the supposed representative capacity of administratrix of her husband's estate. To my mind, there can be only one answer to that question. The indorsement on the writ says in terms that the plaintiff's claim is as administratrix of the estate of Patrick Joseph Finnegan, deceased. I think it follows that, without going any further, we are bound on the authorities to hold that this writ was void ab initio. If I am wrong in so thinking, and it is legitimate to qualify the effect of the writ by reference to the statement of claim, which was delivered at the same time as the writ was served, the result must still, to my mind, be adverse to the plaintiff. Taking the indorsement on the writ and the statement of claim together, it seems to me reasonably plain that what the plaintiff was purporting to do was to sue in the representative capacity of administratrix of her husband's estate and in no other capacity.

I have only to add that, in my view, *Stebbings* v. *Holst & Co. Ld.*,[15] the decision of Donovan J. to which my Lord has referred, is distinguishable from *Hilton* v. *Sutton Steam Laundry*,[16] and from the present case, by the circumstance that the claim was there in terms made by the widow not merely as administratrix, but as widow and administratrix, and it was possible, therefore, to say that she was suing as widow so far as the claim under the Fatal Accidents Acts was concerned.

One other case was referred to, namely, *Hill* v. *Luton*

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[15] [1953] 1 W.L.R. 603.

[16] [1946] K.B. 65.

Corporation,[17] a decision of Devlin J. That case is also, to my mind, clearly distinguishable, for the defect in the proceedings relied on by the defendants consisted of an alleged want of particularity in the indorsement on the writ, and the judge was able to hold in that case that the want of particularity in the indorsement was cured by the statement of claim. To a case of that sort I think that different considerations apply. It is, of course, clear in any event that if there was any inconsistency between *Stebbings* v. *Holst & Co. Ld.*[18] and *Hill* v. *Luton Corporation*[17] and the cases in this court to which I have referred, it would be the duty of this court to follow its own decisions; but for the reasons which I have shortly stated, I do not regard *Stebbings* v. *Holst & Co. Ld.*[18] and *Hill* v. *Luton Corporation*[17] as inconsistent with those decisions.

Accordingly, with regret, I agree with my Lord that there is no alternative here but to dismiss the appeal.

MORRIS L.J. I am of the same opinion and am in full agreement with the two judgments which have been delivered. I only add a few words because of the importance of the matters which have been raised in this appeal. It seems abundantly clear that the action brought by the plaintiff was brought by her in a representative capacity, that is to say, in the capacity of administratrix. The indorsement on the writ clearly so shows: the opening words are "The plaintiff's claim is as administra-"trix." That language differs from the language of the indorsement in *Stebbings* v. *Holst & Co. Ld.*,[18] where the words were "The plaintiff's claim is for damages under the Fatal Accidents "Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, "as widow and administratrix of the estate of Alfred Stebbings "deceased." The present words are similar to the words that are to be found in *Hilton* v. *Sutton Steam Laundry*,[19] where the writ was issued by the plaintiff as administratrix of the deceased's estate. It is provided by Ord. 3, r. 4 (1): "If the plaintiff sues, "or the defendant or any of the defendants is sued, in a repre-"sentative capacity, the indorsement shall show, in manner "appearing by such of the Forms in Appendix A, Part III, "section 7, as shall be applicable to the case, or by any other "statement to the like effect, in what capacity the plaintiff or "defendant sues or is sued."

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[17] [1951] 2 K.B. 387; [1951] 1 T.L.R. 853; [1951] 1 All E.R. 1028.

[18] [1953] 1 W.L.R. 603.

[19] [1946] K.B. 65.

When para. 1 of the statement of claim is looked at, it confirms that the action was brought in the representative capacity of administratrix. Para. 1 reads: "The plaintiff is the "widow and administratrix of Patrick Joseph Finnegan (herein-"after called the deceased) and she brings this action for the "benefit of the dependants of the deceased under the Fatal "Accidents Acts, 1846–1908, and for the benefit of the "deceased's estate." She could only sue as widow if there was no administratrix, for the action was brought within six months of the death of the husband. And she herself asserted that she was administratrix. It appears, therefore, that she was suing in a representative capacity. Furthermore, some of the claims made in the action could not be made by the widow, namely, the claims under the Law Reform Act.

It is, however, submitted by Mr. Beney that some words in the statement of claim might merely be ignored and that there might be amendment, not by way of adding any words to the statement of claim, but by way of deleting certain words. Mr. Beney relied on Ord. 20, r. 4, which reads: "Whenever a "statement of claim is delivered the plaintiff may therein alter, "modify, or extend his claim without any amendment of the "indorsement of the writ." But what Mr. Beney is seeking to do is not merely to alter, modify or extend the claim, but to alter the capacity in which the action was brought by the plaintiff, and in regard to that matter the decision of this court in *Hilton's* case [19] appears to me to be conclusive. In *Hilton's* case [19] there were applications for leave to amend by striking out the claim under the Law Reform (Miscellaneous Provisions) Act, 1934, and varying the claim under the Fatal Accidents Act so as to make it a claim by the plaintiff in a personal capacity. This court held that that could not be done. That is really what Mr. Beney is seeking to do here. Lord Greene M.R. said [20]: "It is perfectly true that the result is the same whether an action "under the Acts is brought by the personal representative or by "the dependants. It does not alter the fact that the action, "looked at technically, is an action in different capacities, and "the capacity in which it is brought must, under Ord. 3, r. 4, "be stated in the indorsement on the writ. That was done in "this case and the plaintiff bound herself to an action in a "representative capacity which she did not possess, and, "unfortunately, she must take the consequences." Much as I

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[19] [1946] K.B. 65.

[20] Ibid. 73.

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Morris L.J.

regret the conclusion at which we are arriving, I consider that this appeal from the decision of Parker J. must be dismissed.

In *Burns* v. *Campbell* [21] the position was that the plaintiff issued a writ in the High Court in England by which she claimed as administratrix of the deceased for damages under the Fatal Accidents Act. The writ was issued within 12 months from the death, but at the date of issue the plaintiff had only obtained a grant of administration in Northern Ireland. Denning L.J. said [22]: "The result is that on January 19, 1951, when the writ "was issued, the widow had not a grant of administration to the "English assets. So far as the English courts were concerned, "she was not the administratrix. The action was therefore not "properly constituted. It purported to be an action by her "as administratrix, but she was not an administratrix. The "action was therefore a nullity: see *Hilton* v. *Sutton Steam* "*Laundry*.[23]"

Appeal dismissed with costs.
Leave to appeal to House of Lords.

Solicitors: *R. I. Lewis & Co.; Goldingham, Wellington & Co.*

A. W. G.

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[21] [1952] 1 K.B. 15.

[22] Ibid. 17.

[23] [1946] K.B. 65.

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Jan. 22.

Lord Goddard C.J., Croom-Johnson and Pearson JJ.

REGINA *v.* NATIONAL JOINT COUNCIL FOR THE CRAFT OF DENTAL TECHNICIANS (DISPUTES COMMITTEE) AND OTHERS; *Ex parte* NEATE AND ANOTHER; REGINA *v.* SAME.

Crown Proceedings—Certiorari—Prohibition—Inferior court—Private arbitrator.

Where an indenture of apprenticeship provided that any dispute between the parties to the indenture should be submitted for arbitration to a private body named in the indenture, an order of certiorari or of prohibition would not issue to that body from the Divisional Court.

The prerogative writs only issued to inferior courts, to bodies set up by statute which had been entrusted by Parliament with

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[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

duties of an administrative and judicial nature and whose jurisdiction might affect the rights of subjects, and to statutory arbitrators to whom by statute the parties must resort.

APPLICATION for orders of certiorari and prohibition.

On December 20, 1948, an infant, Robin D. G. Neate, bound himself by an indenture to serve for five years as an apprentice to a dental surgeon to learn the craft of dental mechanics. Clause 6 of the indenture stated: "This indenture shall be "registered with the National Joint Council for the Craft of "Dental Technicians and the parties to this indenture hereby "jointly and severally agree that all questions or differences "whatsoever which may at any time hereafter arise between the "parties hereto or their respective representatives touching these "presents or the subject-matter thereof or arising out of or in "relation thereto respectively and whether as to construction or "otherwise shall be referred to the National Joint Council for the "Craft of Dental Technicians and each of the parties shall do all "acts and things and execute all deeds and instruments neces"sary to give effect to the award made pursuant to this "submission."

In March, 1951, the articles of apprenticeship were taken over by Alastair MacDonald and R. David Plowman, dental surgeons. In March, 1952, a dispute arose between the parties as to the termination of the apprenticeship, and the employers referred the dispute to the National Joint Council for the Craft of Dental Technicians as provided by the indenture. The council remitted the matter to its Disputes Committee. At a meeting held on July 2, 1952, the committee awarded that the employers were entitled to terminate the articles of apprenticeship.

On the following day, July 3, 1952, the employers terminated the articles of apprenticeship. On October 31, 1952, the infant and his mother, Mrs. Marjorie Ruth Neate, obtained leave to move for orders of certiorari and prohibition directed to the Disputes Committee to quash their award declaring the employers entitled to terminate the apprenticeship and prohibiting them from further proceeding in the arbitration.

R. Bax for the applicant. There was no valid reference to arbitration, for the pretended reference shows no dispute: *Rex* v. *Powell; Ex parte Marquis of Camden.*[1]

[1] [1925] 1 K.B. 641; 41 T.L.R. 277.

[Lord Goddard C.J. Is this a private arbitration tribunal?] Yes.

[Lord Goddard C.J. The court must be satisfied that it is a case where orders of certiorari and prohibition can issue.]

There appear to be no authorities with regard to private arbitrators. The writs have been issued to statutory arbitrators: *Rex* v. *Electricity Commissioners; Ex parte London Electricity Joint Committee Co. (1920) Ld.*[2]

[Lord Goddard C.J. One of the reasons why the court issues these writs to the Electricity Commissioners is that they can act whether the parties affected like it or not. Parliament has given them certain powers and the court may have to restrict their exercise of those powers if they act outside their jurisdiction, and similarly in cases where statutes like the Agricultural Holdings Act, 1923, lay down certain matters which have to be decided by arbitration.]

The principle might be extended to cases where persons have rights to act inter partes.

[Lord Goddard C.J. It would be revolutionary if this court were to grant an application for these writs to issue to a private arbitrator. These writs issue from a superior court to an inferior court. These gentlemen are not entrusted by law with any functions at all. They have simply been given certain rights by the parties to the indenture. The proper course to take would be to move for an injunction.]

Astell Burt for the Disputes Committee of the National Joint Council for the Craft of Dental Technicians and *H. Vester* for the employers were not called upon.

Lord Goddard C.J. In this case Mr. Bax obtained leave to move for orders of certiorari and prohibition directed to a body called the Disputes Committee of the National Joint Council for the Craft of Dental Technicians. I think possibly that the court giving leave may have thought at the time that the National Joint Council by reason of its name was a statutory body, but as soon as the court saw the papers in this matter it occurred to them to inquire about the constitution of this body because, unless there is a body set up by statute and which has duties conferred on it by statute so that the parties are bound to resort to it, it appeared to the court that it would be a very novel proceeding indeed if we issued these prerogative writs to it. It turns out that this committee are merely arbitrators appointed under an ordinary submission to arbitration contained in an indenture of apprenticeship.

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[2] [1924] 1 K.B. 171; 39 T.L.R. 715.

Disputes are said to have arisen—it may be that it is denied that any disputes have arisen—under an indenture of apprenticeship concerning a young man named Robin Neate, under which he was to be taught the craft of a dental mechanic. [His Lordship read clause 6 of the indenture and continued:] That is simply a reference to an arbitrator. I have never heard of certiorari or prohibition going to an arbitrator, and in this respect I am going to apply to this matter the words of Lord Sumner in the well-known case of *Admiralty Commissioners* v. *S.S. Amerika*.[1] There the question was whether an action lay for the death of a person, and he said: "Never during the many cen-" turies that have passed since reports of the decisions of English " courts first began has the recovery of damages for the death of a " human being as a civil injury been recorded." I should apply that to this case, and say that never during the many centuries that have passed since reports of the decisions of English courts first began is there any trace of an arbitrator being controlled by this court either by writ of prohibition or certiorari.

Arbitration is a very old remedy in English law. In the reports in the eighteenth century many cases are recorded in which the parties had resorted to arbitration, and where are to be found the various remedies which the court has exercised in relation to arbitrators. There have been various statutory provisions. I think that the Common Law Procedure Act, 1852, contained provisions with regard to arbitrations and the methods of testing decisions of arbitrators in the court; certainly the modern Arbitration Acts have done so, and there are provisions in the Arbitration Act, 1950, which is a consolidating Act. One can compel an arbitrator to state a case. One can move to set aside his award, and in a proper case can get an injunction against a man if he is purporting to act as an arbitrator and there is no submission. It is a common thing when people appear before an arbitrator for one side to say: "I do not know why " we are here, because there is no dispute between us." If it is found that there is no dispute, the arbitrator cannot, of course, make an award, and if he does, it can be set aside.

But the bodies to which in modern times the remedies of these prerogative writs have been applied have all been statutory bodies on whom Parliament has conferred statutory powers and duties which, when exercised, may lead to the detriment of subjects who may have to submit to their jurisdiction. Where a statute, for instance, gives power for the compulsory acquisition of land, and an arbitrator is set up by Parliament to assess the compensation, or where, as in *Rex* v. *Electricity Commissioners; Ex parte London Electricity Joint Committee Co. (1920) Ld.*,[2] the tribunal were a body on whom a great many powers had been conferred by Act of Parliament, it is essential that the courts should be able to control the exercise of their jurisdiction strictly within the limits which Parliament has conferred upon them. But that is quite a different thing from saying that an arbitrator can be controlled by this court by means of an order of certiorari or prohibition because, although the arbitrator is going to settle the dispute between the parties, in one sense he is the antithesis of a court. A person goes to arbitration because he does not want to go to the court. Therefore, he sets up his own private judge to decide the case, but the arbitrator is not deciding it as a judge, he is deciding it as an arbitrator, and procedural rights and all matters relating to procedure are to be found in the Arbitration Act, 1950.

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[1] [1917] A.C. 38, 51; 33 T.L.R. 135.

Prohibition is a writ which lies from a superior court to an inferior court. Certiorari lies to bring up the decision or record of the inferior court to this court with a view to it being quashed. It is granted and directed to one of the inferior courts, such as magistrates' courts and county courts, and it has been extended to the various bodies which have been entrusted by Parliament with duties partly of an administrative character and partly of a judicial character in some cases, but cases in which subjects may be affected by their decisions. There is no instance of which I know in the books where certiorari or prohibition has gone to any arbitrator except a statutory arbitrator, and a statutory arbitrator is a person to whom by statute the parties must resort.

For these reasons, I think that it would be a great departure from the law relating to prerogative writs if we were to apply these remedies to an ordinary arbitrator, whether the arbitrator is a single arbitrator or a body of men who are called a council. For these reasons I am of opinion that we must dismiss these applications on the ground that they are wholly misconceived.

CROOM-JOHNSON J. I agree that these applications are wholly misconceived. It is an attempt by the use of prerogative writs to take a short cut to stop an arbitration which has, rightly or wrongly, been set on foot pursuant to a submission to arbitration contained in an indenture of apprenticeship.

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[2] [1924] 1 K.B. 171; 39 T.L.R. 715.

It was apparently suggested that there was no binding submission, or that one of the persons who was going to act—whether he had acted or not seems open to doubt—as an arbitrator had, in the language of the old cases, misconducted himself by reason of the fact that he had seen both parties in the absence of the other before he took upon himself the burden of the arbitration. The well-known provisions of the old Arbitration Act of 1698 and of the Act of 1889 are now enshrined in the modern Arbitration Act of 1950, under which it is possible to go to the court to get rid of arbitrators who misconduct themselves, or to get their award set aside. All that has been well known, and, indeed, the provision for applications and the way in which they are to be set on foot has been laid down in Ord. 59, r. 39, of the Rules of the Supreme Court. There is no difficulty about it. The only change which has been made is that at one time—and this may have given rise to the confusion—those motions under the Rules of Court were heard by three judges in the Divisional court, or at one time, I think, by two judges in the Divisional Court. In recent times that procedure has been altered, and they are not now heard by a Divisional Court, and Ord. 59, r. 39, now contains an express provision that those applications shall be heard by a single judge in court, and they are now put into the list of the judge who takes Special Cases.

This being a private arbitration between private individuals but directed, it is true, by agreement to a body which has the name of the National Joint Council for the Craft of Dental Technicians, which would seem to be a trade union, all those questions have to be dealt with by persons who represent that body, and that is all. They are in no sense a public body—like the Electricity Commissioners. Their authority does not depend upon any statutory jurisdiction. People are not compelled to abide by their decision as people were compelled in so many of these cases as, for example, the *Electricity Commissioners'* case,[2] by statute to submit to orders which were made subject to various safeguards.

This body, apparently, has been confused with a statutory body, which it is not. This is a private arbitration body set up as arbitrators by agreement between the parties, and is a private

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[2] [1924] 1 K.B. 171; 39 T.L.R. 715.

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Regina v. National Joint Council for the Craft of Dental Technicians (Disputes Committee); *Ex parte* Neate. Regina v. Same.

arbitration tribunal. I think that it must have come as a shock to those of us who for years past dealt with arbitration work, of which there was, and still is, a very large amount with regard to private tribunals, to hear it even suggested in 1953 that it is possible to come to this court in order that we should intervene in a matter of this sort. I agree with the order proposed by my Lord that these applications must be dismissed.

Pearson J. I agree, and have nothing to add.

Application dismissed.

Solicitors: *Lamartine Yates & Lacey, agents for Francis & Davies; Beddington, Hughes & Hobart; Tackley, Fall & Read.*

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Apr. 15.

Singleton, Jenkins and Morris L.JJ.

DUMMER *v.* BROWN AND ANOTHER.

[1952 D. No. 6291.]

Practice—Summary procedure—Negligence—Personal injuries—Action under Fatal Accidents Acts—Procedure—Applicability of Ord. 14 *—Sufficiency of affidavit in support of order.*

The plaintiff, whose husband had been killed when riding as a passenger in a motor-coach owned by the first defendant and driven by the second defendant, sued both defendants for damages under the Fatal Accidents Act. The writ and the statement of claim in the action were delivered together. The defendants by their defence made no admissions save that on the day in question the first defendant's motor-coach was being driven on the road in question by the second defendant, and they put the plaintiff to proof of her case. The second defendant having been convicted at Bedford Assizes of dangerous driving (to which he had pleaded guilty) and sentenced to imprisonment, the plaintiff applied to a master for leave under Ord. 14 to sign summary judgment, and in support of her application filed an affidavit in which she mentioned the conviction and admission of the driver of the coach. The master refused the application, but McNair J., on appeal to him in chambers, reversed the master's order and gave leave to the plaintiff to sign judgment against the defendants for damages to be assessed. The defendants appealed, contending that Ord. 14 was not applicable to actions for damages under Lord Campbell's Act:—

Held (*per* totam curiam), that procedure under Ord. 14, read in conjunction with Ord. 3, r. 6, was applicable to claims in negligence arising out of accidents causing death or personal injuries, though the proportion of such cases which would be suitable subjects for summary procedure must be very small.

Held, further, *per* Jenkins and Morris L.JJ., that the affidavit sworn by the plaintiff, though open to criticism, in that it turned on matters which were not within the plaintiff's own knowledge and failed to state, in accordance with the Rules of Court, the deponent's means of knowledge, had not been answered by the defendants by an affidavit giving some indication of a real defence on the issue of liability, and therefore, the judge having in the exercise of his discretion come to the conclusion that there was no defence, and it being a proper case for summary judgment, the appeal should be dismissed.

Per Singleton L.J. (dissenting): If there is to be a complete change in procedure, and Ord. 14 is to be applied to an action for damages for negligence based on Lord Campbell's Act, the affidavit must be in proper form and sworn by the plaintiff or by some other person who can swear positively to the facts verifying the cause of action. I do not find that from the affidavit of the plaintiff and I should be disposed to allow the appeal.

APPEAL from McNair J.

On March 22, 1950, when the husband of the plaintiff, Mrs. Beatrice Mary Dummer, was, with the members of a rugby football team, being driven back from Bedford to Olney, in a motor-coach owned by the first defendant, Benjamin Hugh Brown, and driven by Albert Claud Sell, the second defendant, an accident occurred, the coach colliding with a telegraph post, and Dummer sustained injuries from which he died. Sell was subsequently charged at Bedford Assizes with manslaughter. He pleaded "Not Guilty," but guilty of dangerous driving. That plea was accepted and he was sentenced to 10 months' imprisonment and disqualified from driving for five years. In these circumstances Mrs. Dummer, as administratrix of her husband, sued both the defendants for damages under the Fatal Accidents Acts, alleging that the death of the deceased was due to negligence on the part of the driver, who at the time of the accident was acting in the course of his duties as servant or agent of Mr. Brown, the owner of the coach. By the plaintiff's statement of claim particulars of the alleged negligence were given, and the defendants, by their defence, made no admissions, save that the coach was being driven by Sell, and put the plaintiff to proof of the matters alleged by her.

On February 20, 1953, the plaintiff applied to Master Baker for leave under Ord. 14 to sign summary judgment in the action against both defendants, damages to be assessed by a writ of inquiry, an affidavit, in support of the contention that there was no defence to the action, being sworn by the plaintiff. Master Baker dismissed the application, but on March 13 McNair J., in chambers, rescinded the order of the master and gave the plaintiff leave to sign summary judgment for damages to be assessed.

The defendants appealed, contending that an order under Ord. 14 was not applicable to an action for damages under the Fatal Accidents Acts.

Stephen Chapman for the defendants. It is submitted that Ord. 14 is not applicable, and was never intended to be applicable, to actions for damages in running-down cases and cases under Lord Campbell's Act. If the procedure is applicable at all it must be in a case where someone can set out all the material facts leading up to the accident and is able to verify the claim for damages by stating the facts from personal knowledge. The affidavit in the present case in support of the application for leave to sign summary judgment is insufficient and the order of the master should be restored.

MacDermot for the plaintiff. The circumstances where an order under Ord. 14 can reasonably be made in such cases as the present must be exceptional and rare. It is only where, as here, there can be no allegation of contributory negligence, and no other vehicle is involved, and there has been a clear admission on the part of one or both of the defendants, that such a procedure can be taken. The object is to save costs and enable the real issue, the assessment of damages, to be dealt with as cheaply and as expeditiously as possible. Quite clearly this is a case where there is no defence, and if the plaintiff had received from the defendants an assurance that liability would not be disputed the procedure under Ord. 14 would not have been invoked. The driver having been convicted on his own admission of dangerous driving, and it being admitted that it was in the course of his duty as the first defendant's servant, both defendants were liable. Although there appears to be no direct authority on the point, a note in the Annual Practice, at p. 175, supports the contention that Ord. 14 is applicable to this case.

SINGLETON L.J. stated the facts and continued:—It is alleged in paragraph 3 of the statement of claim that the accident and the death of Mr. Dummer were due to negligence on the part of the second defendant, who, at the time, was acting as servant or agent of the first defendant. Particulars of negligence were given. The particulars required by the Fatal Accidents Act, 1846, are set out.

The defence, which was delivered on February 6, 1953, puts the plaintiff to proof of the matters alleged in paragraphs 1, 4 and 5 of the statement of claim. Paragraph 2 reads: "Save that "on the day alleged a motor-coach belonging to the first defen- "dant was being driven by the said second defendant along "Bromham Road, in the County of Bedford, no admissions are "made of any of the matters alleged in paragraph 2 of the "statement of claim. (3) The defendants deny that they were "negligent as alleged, or at all. (4) The damage and loss alleged "are denied and save as is expressly admitted herein each and "every allegation made in the statement of claim is denied "as though each of them were here set out and separately "traversed."

It used to be taught that one object of the pleading was to let the other side know what your case was. That practice may not have been followed at all times. It certainly could be said of this defence (which was not settled by Mr. Chapman), that it tells no one anything. It puts everything in issue except that the coach was on the highway, and no one can tell from the defence what case the defendants will put forward upon trial, or what the issues are. It may be said, as Mr. Chapman in his argument put it, that the defendants were saying, "The onus is "upon the plaintiff; let the plaintiff prove her case. We are "entitled to put everything in issue," and that is what they did.

The statement of claim was delivered with the writ. Order 3, r. 6, provides that that can be done, an amendment of the rule which was made in the year 1933 following, I think, upon the report of the Hanworth Committee. This claim was within Ord. 3, r. 6 (4). On February 20, the plaintiff launched an application under Ord. 14 that she be at liberty to sign judgment in this action against the defendants, damages to be assessed by a writ of inquiry. Master Baker dismissed that application. The plaintiff appealed to McNair J. in chambers and the order of the judge is: "It is ordered that the said appeal be allowed and that "the plaintiff be at liberty to sign judgment against the defen- "dants for damages to be assessed and costs, including the costs "of this appeal, to be taxed." The defendants appeal against that order, and Mr. Chapman, on their behalf, submits that the order of the master was right and that the order of McNair J.

should be set aside. It is to be observed that upon that application it was asked that the damages should be assessed by way of a writ of inquiry. It was pointed out to this court that under Ord. 14, r. 7, the assessment of damages may be made in such way as the judge may direct.

The application of the provisions of Ord. 14, r. 1, to an action for damages under Lord Campbell's Act or, indeed, to any motor-car accident case, strikes one, at first, as unusual, to say the least. I do not know that the procedure has ever been applied until this case. It may have been, but I cannot find that there is any record of it. None the less, if it is right, there is no reason why it should not be adopted merely because it has not been adopted until now.

[His Lordship read Ord. 14, r. 1,[1] and continued:] The amendment to Ord. 3, r. 6, in the year 1933 brings the possibility of this class of claim being dealt with under Ord. 14, r. 1, into being. The wording of the rule is sufficiently wide to cover it, but one thing which is clear is that the granting of the request of the plaintiff that he should have summary judgment is discretionary in the judge, who *may* make an order. Order 14 was intended as a means by which the plaintiff could obtain speedy judgment when a defendant had no defence, or nothing that looked like a defence. It is said by Mr. MacDermot, on behalf of the plaintiff, that in the circumstances of this case there is no answer to the plaintiff's claim, except as to the amount of damages which should be awarded. He submitted to this court that the order of McNair J. was right and that if this practice was followed considerable costs would be avoided. I am not sure that that is wholly right.

I do not think it is wise that in a case under Lord Campbell's Act the damages should be assessed by a sheriff's jury. Apart

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[1] R.S.C., Ord. 14, r. 1: "Where "the defendant appears to a writ of "summons specially indorsed with or "accompanied by a statement of "claim under Ord. 3, r. 6, the plain- "tiff may on affidavit made by him- "self or by any other person who can "swear positively to the facts, verify- "ing the cause of action and the "amount claimed (if any liquidated "sum is claimed), and stating that "in his belief there is no defence to "the action except as to the amount "of damages claimed if any, apply "to a judge for liberty to enter judg- "ment for such remedy or relief as "upon the statement of claim the "plaintiff may be entitled to. The "judge thereupon, unless the defen- "dant shall satisfy him that he has a "good defence to the action on the "merits or shall disclose such facts "as may be deemed sufficient to "entitle him to defend the action "generally, may make an order em- "powering the plaintiff to enter such "judgment as may be just, having "regard to the nature of the remedy "or relief claimed."

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from the amount of the damages, there arises in such a case the apportionment of damages. I think it is better in a case of difficulty that the damages should be assessed by a judge of the High Court. Thus I regard it as desirable that the case should in any event remain for trial in the High Court. If it is said that the costs of the trial will be much less if the question of liability is disposed of, again I am not so sure that that follows. I do not think that it would be necessary for the plaintiff to have many witnesses as to facts, if she was armed at the trial with evidence that the coach in which the deceased man was riding went to its wrong side of the road and struck a tree or telegraph pole, and was also armed with proof of the conviction, on his own confession, of the motor-coach driver on a charge of dangerous driving. I ought to say that we were told that the driver was prosecuted on a charge of manslaughter and committed to the assizes at Bedford upon that charge. But after some discussion it was decided that he should plead guilty to the charge of dangerous driving. He did so, and he was sentenced to imprisonment and was disqualified from driving for a considerable period. Thus it looks as though there was negligence on the part of the first defendant's driver. Mr. Chapman, in the course of his argument, told us that the driver was acting within the scope of his employment. Upon that, it appears as though a case can be made against the employer as well.

Mr. MacDermot put the case in support of the order of McNair J. in this way: "I have proved that there was an "admission of dangerous driving on the part of the second "defendant, and it is agreed that that dangerous driving occurred "at the time that Mr. Dummer was killed. I have thus given "evidence of negligence on the part of the driver and that "entitles me to judgment against the driver on his plea of guilty, "which is an admission by him. If I am entitled on behalf of "the plaintiff to judgment against the driver, it follows that the "employer is vicariously responsible and I am entitled to judgment against him too." That seems to me to raise a position of some little difficulty. On a trial the employer could have objected that the admission of the driver was not evidence against the employer, for the driver was not his agent to make admissions. There would remain not only that question to be decided, but, if the evidence was received and admitted and if it was decided upon that admission that the driver was responsible in damages, there would remain the question of vicarious responsibility on the part of the employer. It is said that Ord. 14, r. 1, does not provide suitable procedure for determining that question and that the court ought not, on this procedure, to give judgment against the employer even if it thought that a judgment against the driver himself was warranted. Those are some of the difficulties which occur, and I think that they are formidable difficulties.

After hearing argument on both sides, I think that the provisions of Ord. 14, r. 1, are wide enough to cover this class of case, but I would keep it to the most simple case, and I would not apply those provisions to a case involving any sort of complication or difficulty, because of the general practice which has been followed, that it is only in the clearest case, where there is no defence, that judgment ought to be given against a defendant under the provisions of Ord. 14, r. 1.

There is a further difficulty in this case. Not only are there two defendants against whom the plaintiff asks for judgment, but the affidavit in support is not sufficient. The affidavit follows form No. 23 (A) in Appendix "B" in the Annual Practice, at p. 2565. The old form, which provided for the normal case under Ord. 14 when an effort was being made to get summary judgment in respect of a debt owed by the defendant, was "1. The "defendant is justly and truly indebted to me in the sum of" [so much for such and such a thing] "and was so indebted at "the commencement of this action. The particulars of the said "claim appear by the indorsement on the writ of summons in "this action. 2. I verily believe that there is no defence to this "action." It is necessary, as the early part of Ord. 14 shows, that there should be an affidavit, and the words of the order are: "The plaintiff may on affidavit made by himself or by any other "person who can swear positively to the facts, verifying the "cause of action and the amount claimed (if any liquidated sum "is claimed), and stating that in his belief there is no defence to "the action except as to the amount of damages claimed if any, "apply to a judge for liberty to enter judgment for such remedy "or relief."

The affidavit in this case was sworn by Mrs. Dummer, the plaintiff. I bear in mind that Mr. MacDermot informed the court that he had told McNair J. that he was ready and willing to amend paragraph 2 of that affidavit, or to put in a further affidavit to meet that which was raised as to paragraph 2. It seems to me that if there is to be a complete change in procedure, and if Ord. 14 is to be applied to an action for damages for negligence based on Lord Campbell's Act, the affidavit must be in proper form and sworn by the plaintiff or by some other person who can swear positively to the facts verifying the cause of action. I do not find that from the affidavit of Mrs. Dummer. Paragraph 1 says: "I, Beatrice Mary Dummer, of 128 Honey "Hill Road, Bedford in the County of Beds. widow make oath "and say as follows: (1) The defendants are liable under the "Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous "Provisions) Act, 1934, for damages for personal injuries to and "for the death of William Richard Dummer deceased caused by "the negligent driving of the defendant Albert Claude Sell, acting "as the servant or agent of the defendant Benjamin Hugh "Brown, on or about the 22nd day of March, 1952, particulars "whereof appear by the statement of claim in this action and "were so liable at the commencement of this action."

The widow, the plaintiff in the action, says that the defendants are liable under the Fatal Accidents Act for negligence. That is not verifying the cause of action. She was not there so far as I know; she does not say that she was. She deposes on oath to the fact that the defendants are liable for negligence. That may very well be so, but that paragraph of the affidavit, in my view, does not verify the cause of action. Then paragraph 2 says: "At the "Bedford Summer Assizes held in May, 1952, the defendant "Albert Claude Sell pleaded guilty to a charge of dangerous "driving of a motor-coach in which the said William Richard "Dummer deceased was a passenger at the time of his death "and the said Albert Claude Sell was sentenced to 10 months' "imprisonment." It was pointed out in the course of the argument that that was not the strict way to prove a conviction. Mr. MacDermot submitted that he was entitled to prove an admission in that way. The paragraph of the affidavit does not say that Mrs. Dummer was present when the plea of guilty was entered. She may have been, but it does not say so. Upon that Mr. MacDermot said that he had offered to have a further affidavit sworn, if necessary.

In paragraph 3, Mrs. Dummer, the plaintiff, deposes: "I "verily believe that there is no defence to this action save as to "the amount of damage." That is all that was before the court, apart from the pleadings. It should be made clear that it is only in a very unusual case that this procedure can be applied to an action under Lord Campbell's Act or to an action for damages for personal injury. If it is to be applied, the affidavit ought to be in strict form, verifying the cause of action. This affidavit, in my view, does not do that. I have sympathy with the position of a plaintiff in such a case who, deprived of her breadwinner, has to wait a long time until an action comes on for trial, and has to wait in uncertainty as to whether the action is to be fought or not. I would much rather, in a case of this kind, see the position of the defendants made clear by their pleading; but they are entitled to deny negligence and to ask that the plaintiff shall prove her case against them. If this procedure be available and an affidavit in proper form is put upon the file and no reply comes from the defendants, it may well be that someone looking at their defence and endeavouring to find out what defence they may have, may come to the conclusion that they have not got one. I should perhaps not say it, but I should think it extremely doubtful if this case will ever be fought upon the question of liability. In such a case it may be advisable that an admission be made in good time. Otherwise, the plaintiff may be advised to administer interrogatories, and more expense will be incurred. I think it was undesirable that the application should have been made in this case, in which there were two defendants, and I think, further, that if it was to be made the affidavit ought to have been in proper form and the cause of action ought to have been verified by someone who knew the facts. I do not regard it as sufficient for the purpose.

For these reasons I should be disposed to allow this appeal and to direct that the order of McNair J. be set aside, but as the other members of the court take a different view the appeal will be dismissed.

JENKINS L.J.: I have felt some difficulty over this case and it is with hesitation that I have reached a conclusion differing from that stated by my Lord. There is no doubt that Ord. 14 in its present form, read in conjunction with Ord. 3, r. 6, in its present form, does enable an action of this kind to be made the subject of proceedings for summary judgment under Ord. 14. It is obvious that the proportion of cases of this kind, that is to say, claims in negligence arising out of accidents causing death or personal injuries, which would be suitable subjects for summary procedure, must be small indeed. But, so far as the rules are concerned, there is no procedural reason why that course should not be adopted in a proper case of this class. I need not repeat at length the facts, with which my Lord has already dealt, but it is to be observed that the accident giving rise to the claim in the present case was of this nature: the plaintiff's husband, who was killed in the accident, was being conveyed with other passengers in a motor-coach belonging to the first defendant and driven by the second defendant. The coach got out of control and ran into a telegraph post and, as a result, the plaintiff's husband was thrown from the coach and suffered fatal injuries. That is the nature of the accident as pleaded in the statement of claim. The defence puts the plaintiff to proof of all the allegations in the statement of claim, but the defendant's counsel, in opening the case before us, frankly stated the nature of the accident to have been such as I have described, and did not dispute that the coach was the first defendant's coach, or that it was being driven by the second defendant as the first defendant's servant. I should add that in saying that the defence traversed all the allegations in the statement of claim, I omitted to except an admission that on the date alleged a motor-coach belonging to the first defendant was being driven by the second defendant along the road in question.

In support of the application under Ord. 14 the plaintiff swore the affidavit to which my Lord has referred. That affidavit is, no doubt, open to some criticism. Paragraph 1 in general terms sets out the nature of the case and says that particulars of the accident appear by the statement of claim in the action. That paragraph is by no means satisfactory as evidence. It turns on matters which were not within the plaintiff's own knowledge, and it fails to state, in accordance with the Rules of Court, the deponent's means of knowledge. Still, for what it is worth, it puts the statement of claim on oath. The second paragraph says that at the Bedford Summer Assizes, held in May, 1952, the second defendant pleaded guilty to a charge of dangerous driving of a motor-coach in which the deceased was a passenger at the time of his death, and the second defendant was sentenced to 10 months' imprisonment. It is not in dispute that this somewhat imperfectly expressed paragraph is intended to convey, and it is accepted as conveying, that the plea of guilty to a charge of dangerous driving related to dangerous driving which took place at the time when the fatal accident, which formed the subject of the action, occurred. That affidavit, as I have said, is open to criticism, and it may be that the defendants could have destroyed its effect if they had condescended to answer it by an affidavit on their behalf containing even a slight indication of some real defence on the issue of liability. But they never attempted to do that; they have adopted a purely passive attitude. They put in the defence to which I have referred, which did nothing except traverse in general terms substantially all the allegations in the statement of claim. Having adopted that passive attitude, they say a case for summary judgment under Ord. 14 is not made out. Defendants who take that course do so at their peril, and they have only themselves to thank if their reticence results in the court taking an adverse view of their side of the case. That is exactly what seems to have happened here, for the judge, reversing the master, came to the conclusion that it was a proper case for summary judgment, and in the exercise of his discretion he made the order accordingly.

There was a good deal of discussion in the course of the hearing before us as to the admissibility, as evidence against the first defendant, of the second defendant's plea of guilty to the charge of dangerous driving which, of course, would rank as an admission against that defendant. I do not think that it is necessary for the present purpose to go into that matter. Let it be conceded that this admission would be no evidence against the first defendant. Nevertheless, it is something towards verifying this claim, and something which would have made it proper for the defendants, if they had any real defence on the issue of liability, to file evidence showing what their defence was, instead of simply resting on their wholly uninformative pleading. The case is, I think, near the line, and may well appeal differently to different minds, as, indeed, appears from the fact that my own view diverges from that of my Lord. But this was essentially a matter for the discretion of the judge, and I think that there was material before him on which he could properly find, in the exercise of his discretion, that summary judgment could be given. I am fortified in the conclusion to which I have come not only by the frank statement of the nature of the action made by Mr. Chapman in opening the case for the defendants, but also by the fact that when I asked him what the proposed defence on the issue of liability might be, he was unable to give any answer save that there was some possibility of some expert evidence to the effect that some mysterious defect developed in the front wheels of the vehicle and that that was the cause of the accident. But if there was any real foundation for this theory it could have been made the subject of an affidavit.

Looking at the substance of the matter, it seems to me to be reasonably plain that in truth there is in this case no defence on the issue of liability, and if there is no defence, then it seems to me eminently desirable that costs should be saved by going straight to the issue of the quantum of damage. As to the method of assessing the damages, the direction in the order as it stands is simply judgment for damages to be assessed, which I understand would mean a reference to a sheriff's jury. The suitability of such a tribunal to assess damages in a somewhat difficult case of this sort is, perhaps, open to question, and for my part, to get over that difficulty, I would be willing to consider any suggestion that counsel may wish to make as to some alternative method of assessing damages.

For these reasons I am not prepared, for my part, to disturb the order made by the judge in this case, except as regards the method of assessing damages. I would confirm his order with whatever modification on that point may, after discussion, be found to be proper.

MORRIS L.J. I have in this matter reached the same conclusions as those which have been expressed by Jenkins L.J. I need hardly say that it is with reluctance that I find myself arriving at a view which diverges from that expressed by Singleton L.J. But having given to this matter the best consideration that I can, I have formed the clear view that I would support the decision of the judge.

When the claim was presented against the two defendants, Brown and Sell, a joint defence was put in on their behalf. In para. 2 of that defence it was said: "Save that on the "date alleged a motor-coach belonging to the first defendant "was being driven by the second defendant along Bromham "Road in the County of Bedford no admissions are made of any "of the matters alleged in para. 2 of the statement of claim." It may be that if evidence were given, or an admission made, that a car belonging to one person was being driven on the road by another person, the inference would be drawn, though it could be rebutted, that the person driving was driving as the servant or agent of the owner. In this case it is unnecessary to consider any such aspect of the matter, for Mr. Chapman, in the opening moments of this appeal, very fairly and frankly stated that it was not disputed by him that the second defendant, the driver, Sell, was in fact driving the motor-coach while acting in the course of his employment as a servant of the first defendant.

When the defence was delivered the plaintiff considered that she could show that the second defendant had made what was tantamount to an admission of liability. That being so, the procedure under Ord. 14, r. 1, was adopted. It is probable that there will be few cases in claims of this nature in which the facts and circumstances will be such as to enable this course to be followed. But the wording of Ord. 14, r. 1, is apt to cover the situation in this case. Speaking for myself, I think that there may well be circumstances in which a saving of costs and a saving of public time, and the time of witnesses, may be effected if the facts are such as to warrant this procedure being adopted. The plaintiff, in presenting the summons under Ord. 14, filed an affidavit. I agree that the affidavit is in many respects defective, but we have been told by Mr. MacDermot that he accepted and acknowledged that the affidavit was defective, and that before the judge he offered to file a further affidavit which would correct the defects in the existing affidavit. We were further told that any point based upon the defects in the affidavit was virtually abandoned before the judge by counsel who then appeared for the defendants, and that it was agreed that the plea of guilty to dangerous driving was made by Sell in reference to the time and the event that led to the death of Mr. Dummer. It seems to me that matters concerning an admission such as was made by counsel were matters for the judge and were within his discretion. He was satisfied that it was shown that Sell had pleaded guilty to dangerous driving in reference to the event which brought about the death of Mr. Dummer. It has not been said by Mr. Chapman that the admission made by Sell, an admission made in the face of the court, of guilt of the act of dangerous driving, was not an admission that included within it an admission of negligence. It seems to me clear that it did include such an admission.

We were referred by Mr. MacDermot to *Hollington* v. *F. Hewthorn & Co. Ld.*[2] In that case, in an action arising out of a collision between two motor-cars on the high road, in which the plaintiff alleged negligence on the part of the defendant driver, the plaintiff sought to give evidence of a conviction of the defendant driver for careless driving at the time and place of the collision. It was held by this court that the evidence of the conviction was inadmissible. In the course of his judgment,

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[2] [1943] K.B. 587; 59 T.L.R. 321; [1943] 2 All E.R. 35.

Goddard L.J. said[3]: "Proof of the confession by a witness "present at the trial is admissible because an admission can "always be given in evidence against the party who made it. "In the present case, had the defendant before the magistrates "pleaded guilty or made some admission in giving evidence that "would have supported the plaintiff's case, this could have been "proved, but not the result of the trial." It seems to me, therefore, that once the judge was satisfied by the evidence before him, he had satisfactory proof that the second defendant had made an admission of negligence, and that that admission was such as to entitle the plaintiff to judgment. It has, of course, to be pointed out that it was open to the second defendant to put in an affidavit. He did not choose to do so. If there had been anything at all that he had desired to raise which presented some triable issue he was entitled to raise it, and he could have done so. He did not put in an affidavit at all.

The same applies to the first defendant. He had the opportunity, of which he did not avail himself, of putting in an affidavit. It is well known that if a triable issue is raised in affidavits then the court will not in Ord. 14 proceedings adjudicate upon those issues, but will say that they must be determined in the usual way at a trial. Neither defendant had anything that he desired to raise. That being so, the second defendant had made an admission which was an admission of liability. There is no question, in my view, of evidence being given which was inadmissible against the first defendant. The evidence which was given was clearly admissible against the second defendant and proved liability as against him. Once liability as against him was established then the admission that he was acting in the course of his employment was enough to warrant giving judgment against both defendants.

The summons had asked for damages to be assessed by a writ of inquiry. I agree that there may be some disadvantages in that method of assessing damages in a case of this kind. But that was a matter for the parties. The plaintiff was content for damages to be assessed in that way and the defendants were content. Either defendant could have suggested an alternative method. Had a suggestion been made, I gather that Mr. MacDermot would have agreed that there should be a hearing before a judge. In my judgment, Ord. 14, r. 1, is

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[3] [1943] K.B. 587, 599.

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applicable in this case and, speaking for myself, I think that it was proper to invoke the procedure. I think, therefore, that the judge was warranted in making the order which he made.

Appeal dismissed with costs.
Damages to be assessed by a judge of the High Court at Bedford Assizes.

Solicitors: *Berrymans; Fletcher, Napper & Co. for Dixon, Martell & Co., Bedford.*

A. W. G.

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Feb. 3, 4;
Apr. 27.

Somervell, Birkett and Romer L.JJ.

ENGLAND *v.* NATIONAL COAL BOARD.

[1951 E. No. 458.]

Mines and Minerals — Breach of statutory duty by shot-firer — Mine-worker injured by explosive — Breach of statutory duty also by injured mine-worker — Causation — Liability of mine-owner at common law for negligence of shot-firer—General Regulations, 1913 *(made under section* 86 *of the Coal Mines Act,* 1911) *(S.R. & O.* 1913, *No.* 748), *reg.* 1*—Explosives in Coal Mines Order,* 1934 *(made under section* 61 *of the Act of* 1911) *(S.R. & O.* 1934, *No.* 6), *art.* 2 *(e) and (h).*

The plaintiff mine-worker, who had suffered injury through the premature explosion of a detonator, sued the mine-owners for damages for breach of statutory duty by their servant, a shot-firer. The shot-firer had admittedly committed a breach of the Explosives in Mines Regulations by firing without having first ascertained that all persons in the vicinity had taken proper shelter; but the injured mine-worker had also been guilty of a breach of the regulations in that, by agreement with the shot-firer, he had undertaken to couple up the cable to the detonator—a duty imposed on the shot-firer by the regulations. The trial judge, founding his judgment on the decision of the House of Lords in *Harrison* v. *National Coal Board* [1951] A.C. 639, that the Explosives in Mines Regulations imposed no liability on the mine-owners or their manager for the failure of the shot-firer to perform the duties expressly imposed on him by art. 2 *(e)* and *(h)*, provided they had enforced the regulations to the best of their ability, dismissed the action. On appeal:—

Held, that the cause of the accident was not the breach of the regulations by the plaintiff, but the later, independent and unexplained negligence of the shot-firer; that the effect of statutory provisions such as the mines regulations was not to take away civil rights at common law, and the plaintiff was entitled to recover from the mine-owners damages for injuries caused by the negligence of their servant, the shot-firer.

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APPEAL from Croom-Johnson J., sitting at Swansea Assizes.

On January 25, 1950, the plaintiff, Henry George England, a miner employed by the defendants, the National Coal Board, was working in the defendants' Bwllfa Colliery, at Aberdare. It having become necessary to have a "coal hole" fired, he summoned Edward Williams, a shot-firer duly appointed by the colliery manager in accordance with article 6 (*a*) of the Explosives in Coal Mines Order, 1934. The plaintiff assisted Williams to ram the hole and then, in breach of article 2 (*h*) of the regulations proceeded, with the assent of Williams, himself to couple up the cable to the fuse or detonator wires, while Williams uncoiled the cable and coupled it to the firing apparatus. Williams then, in breach of article 2 (*e*) of the regulations, fired the shot without first seeing that the plaintiff and all other persons in the vicinity had taken proper shelter, with the result that the plaintiff sustained serious injury. By the present action the plaintiff claimed damages from the National Coal Board, alleging breach of statutory duty and, alternatively, breach of common law duty.

The judge, founding his judgment on the decision of the House of Lords in *Harrison* v. *National Coal Board* [1] that the Explosives in Mines Regulations imposed no liability on the mine-owners or their manager for the failure of the shot-firer to perform the duties expressly imposed on him by art. 2 (*e*) and (*h*), providing they had enforced the regulations to the best of their ability, dismissed the action. The plaintiff appealed, contending, inter alia, that he was entitled to recover against the mine-owners damages at common law for the negligence of their servant.

Edmund Davies Q.C. and *Alun Davies* for the plaintiff. It is submitted that quite apart from the statutory regulations the employers are under a common law duty to take reasonable care, a duty which they cannot delegate. Whatever directions they may give to shot-firers and firemen, if they tolerate a dangerous practice they fail to discharge their duty to take proper care. In evidence the plaintiff stated that when he commenced work in the mine he found prevailing a practice whereby the mine-worker discharged the shot-firer's duty to join the cable to the detonator, and that no one told him that it was a breach of the regulations. The management denied knowledge of the practice, but the Coal Board cannot escape liability if those to whom they have delegated

[1] [1951] A.C. 639; [1951] 1 T.L.R. 1079; [1951] 1 All E.R. 1102.

a duty fail to perform it. It matters not whether a particular duty is imposed by regulation on a shot-firer alone; if he acts in a negligent manner the employers are not relieved of their common law duty. The judge founded himself on the decision of the House of Lords in *Harrison* v. *National Coal Board.*[1] Common employment having gone, that case no longer has application to this case. The employer has to devise and maintain a safe system of working, and if he does so but his employees depart from it he will still be liable. If over a long period of time you have obtaining a system whereby the mine-worker is doing what the shot-firer is required to do, there was prevailing a system of working which was dangerous and had resulted in the accident to the plaintiff. If the mine-owners do not take reasonable care to see that their safe system of working is not departed from they are liable. The judge below came to no decision on the plea by the defendants that there was an illegal agreement between the plaintiff and the shot-firer, but the so-called illegal agreement did not extend to the shot-firer's independent breach of the regulations, which was the cause of the accident: see dictum of Lord Dunedin in *Smith* v. *Fife Coal Co. Ld.*[2]

H. V. Lloyd-Jones Q.C. and *D. Meurig Evans* for the National Coal Board. There is no duty imposed by the regulations on the employers to devise a system of working, but there is imposed on the shot-firer a prescribed system of working. Therefore it is wholly irrelevant to consider in the usual way whether or not the employers have devised a safe system. *Harrison* v. *National Coal Board* [3] is authority for saying that the duty is not imposed upon the employers.

[SOMERVELL L.J. The plaintiff's case is common law negligence on the part of the shot-firer, and liability of the employers on the principle of respondeat superior.]

The plaintiff admits that he volunteered to do what he did. Further, he was still in the process of coupling up when he was injured. He therefore falls within the decision in *M'Aulay* v. *James Dunlop & Co. Ld.*[4] The duties imposed on the mine-owner are in respect of employees working in the mine. The plaintiff at the time of the accident had stepped outside his employment and there is no liability by the mine-owner to him. He is a trespasser—not even a licensee. The plaintiff was unlawfully at the place where he was injured, and his breach of the regulations was the sole cause of the accident. As to the claim of the plaintiff under the common law there is a finding by the judge that the defendants had not failed to instruct the shot-firer to carry out the regulations. Once the shot-firer has been appointed neither the mine-owners nor the manager has any control over him in the carrying out of his duties. The whole operation has to be viewed as one operation, and the negligence of the shot-firer cannot travel back to his employers, who have no control over him. The common law is not ousted, but it is without virtue because Parliament has provided for the same thing by a statutory duty which it expressly places on a particular person, i.e., the shot-firer. The plaintiff could not succeed in an action for negligence against the shot-firer because both were engaged in the same unlawful transaction. If there was anything in the nature of an illegal agreement the plaintiff cannot recover. The reasoning in *Stapley* v. *Gypsum Mines Ld.*[5] applies in this case. There would have been no accident if the plaintiff had not been where he was.

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[1] [1951] A.C. 639; [1951] 1 T.L.R. 1079; [1951] 1 All E.R. 1102.

[2] [1914] A.C. 723, 729.

[3] [1951] A.C. 639.

[4] [1926] A.C. 377.

Cur. adv. vult.

April 27. The following judgments were read:—

Somervell L.J. (whose judgment was read by Birkett L.J.). This is an appeal from a decision of Croom-Johnson J. given at the Glamorganshire Summer Assize at Swansea on July 26, 1952, when he decided in favour of the defendants, the National Coal Board. The plaintiff was employed by the defendants at Bwllfa Colliery, Aberdare. He was injured by a shot fired underground. The shot was fired electrically. After a hole has been rammed and the charge inserted, the wires are attached to a detonator. The wires are long enough to enable those concerned to reach a place of safety before the wires are connected to a battery. The circuit is completed by pressing down a switch.

The plaintiff was unable to attend the trial before Croom-Johnson J., and by agreement his proof was read. Except on one point, which is not in the passage I am about to read, it was accepted. This is his account of how the accident happened:
"On Thursday, January 25, 1950, I was working on the morning "shift, commencing at 7 a.m. and due to finish at 2.30 p.m. "On this day, as I knew that the shotsman, Edward Williams, "was shot firing not far away, I shouted to the colliers in the "next 'stent' to pass on to the shotsman to come up to my

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[5] [1952] 2 Q.B. 575.

"stent. The said shotsman, Edward Williams, came there at "about 12 noon. I then told him that I wanted a 'coal hole' "fired. He examined the stent and being satisfied as to its condition he agreed to fire one. I then assisted him to ram the "hole. After this was done the shotsman began to uncoil the "cable. After he had uncoiled the cable I caught hold of the loose "end and said 'I will couple up, Ned.' He replied 'O.K. Harry.' "I was on my knees as there was no height to stand. I then "coupled up the loose end to the detonator wires, and while I "was doing this the shotsman was going along the upper end "still uncoiling. I assumed that he was warning the other "colliers on the upper side as he was going along. It was my "intention after coupling up to crawl on my knees towards the "lower end to warn the colliers there. It took a little time to "connect the wires as I was wearing a pair of what are known "as 'industrial gloves,' and the wires being thin it was a little "difficult to handle. There were four ends. I had connected "one cable end to one of the detonator wires in the hole. I "then proceeded to connect the other end of the cable to the "other end wire of the detonator. As I was proceeding to do this "the hole fired. The hole had been penetrated a yard distant in "the coal, and I was, I should say, about 18 inches from the "mouth of the hole when the shot fired. The explosion caused "the air to be filled with coal dust and powder smoke. The "first reaction I felt was that of blindness and that I had lost "all the feeling one has in the face." The shotsman, Williams, was not called and no explanation given of how he came to fire the shot.

The plaintiff claims, inter alia, for negligence at common law on the grounds that Williams was the servant of the defendants, and was negligent in that he fired the shot without giving any warning or taking any steps to satisfy himself that the plaintiff, whom he had permitted or invited to connect the wires to the detonator, had finished what he was doing and removed to a place of safety.

Shot-firing in mines is the subject of the Explosives in Coal Mines Order, 1934, made under section 61 of the Coal Mines Act, 1911. Article 2 provides: "(*e*) The person firing the "shot shall, before doing so, see that all persons in the vicinity "have taken proper shelter, and he shall also take suitable "steps to prevent any person approaching the shot. He shall "also himself take proper shelter. If he has reason to believe "that there is a possibility of the shot blowing through into "an adjoining place he shall send verbal warning to the "persons in that adjoining place to take proper shelter. "(*h*) Where shots are fired electrically they shall only be fired "by a person authorized in writing by the manager for the "purpose. The authorized person shall not use, for the purpose "of firing, a cable which is less than 20 yards in length. He "shall himself couple up the cable to the fuse or detonator wires "and shall do so before coupling the cable to the firing apparatus. "He shall take care to prevent the cable coming into contact "with any power or lighting cables. He shall also himself couple "the cable to the firing apparatus. Before doing so, he shall "see that all persons in the vicinity have taken proper shelter."

Regulation 1 of the General Regulations, 1913, made under section 86 of the Coal Mines Act, 1911, provides: "It shall be the "duty of the manager and under-manager to carry out and to "the best of their ability to enforce the provisions of every Order "in force under the Act regulating the supply use and storage "of explosives, and it shall be the duty of all persons employed "in or about the mine to comply with the provisions of the said "Orders." Pausing here, it is clear that Williams committed a breach of the first sentence of article 2 (*e*) and of the similar provision in the last sentence of article 2 (*h*). He also broke article 2 (*h*) in that he did not himself couple up the cable to the detonator before coupling the cable to the firing apparatus or at all. The plaintiff, in doing this himself with the approval of Williams, was an accessory or perhaps a principal.

These regulations were considered in the House of Lords in *Harrison* v. *National Coal Board*.[1] The accident there was at a time when the principle of common employment was in force. The breach of the regulations was that the shot-firer had given no warning, as required by article 2 (*e*) and (*h*). From the statement of facts it would appear that the shot-firer ought to have known that the plaintiff was there. The plaintiff started by claiming, as here, for negligence at common law and for breach of statutory duty, the shot-firer having, it was alleged, committed a breach of the regulations I have cited. Common employment was a complete answer to a claim at common law, as the plaintiff was relying solely on the negligence of the shot-firer, so that was abandoned in the court of first instance.

The questions taken to appeal were whether the provision broken imposed a duty on the owners and also on the manager

[1] [1951] A.C. 639; [1951] 1 T.L.R. 1079; [1951] 1 All E.R. 1102

of the mine or solely on the shot-firer. If on the manager, it was submitted that he was not in common employment. It was held that the only duty in the manager was to enforce the regulation to the best of his ability, and this, on the judge's finding, he had done. Lord Porter came to the conclusion [2] "that the "Act and regulations create two sets of duties, one placed on "the owner personally; the other upon his employees. The first "may exist either by direct enactment or be derived from the "substance of the relevant section or regulation. Where, how-"ever, neither of these circumstances exists the only obligation "of the owner is to be found in sections such as section 75" (of the Coal Mines Act, 1911) "which impose a qualified duty upon "the owner, making him responsible both civilly and criminally "unless he has used due care." Having regard to the duties imposed on a shot-firer "which he alone can carry out, with "which even a manager is not allowed to interfere and which, "moreover, it would be difficult if not impossible to oversee," [3] the provision in question did not impose a duty on the owners. Similar opinions were expressed by the other noble and learned Lords who constituted the majority, Lord Reid dissenting.

A further question was canvassed but not decided in *Harrison's* case,[4] and it was this. Assume that the doctrine of common employment was abolished, as it has since been, assume that the plaintiff cannot establish negligence at common law of the fellow servant but only a breach of statutory duty imposed not on owners or employers as such but on a servant, would the owners be liable on the same basis as if the damage was due to negligence by one of the servants at common law? Lord MacDermott thought that they would. Lord Porter, at the end of his opinion, made it clear that he regarded the point as open. Lord Normand expressly reserved it. Lord Oaksey's agreement with the other majority opinions was clearly on the point which arose for decision on which they were all agreed. For reasons which will emerge I do not find it necessary to decide the point. The judge regarded *Harrison's* case [4] as leading to a conclusion in favour of the defendants. It is a complicated area, and although, of course, *Harrison's* case [4] precludes the plaintiff from alleging a breach of statutory duty by the owners, I do not think that that concludes the matter.

The first question to be considered, in my opinion, is whether the plaintiff can rely, as against the Coal Board, on Williams' negligence at common law. If he can, then what is the effect of the fact that the plaintiff, at the time of the accident, was doing an act which under the regulation had to be done by Williams? Williams left the plaintiff at the detonator and let off the charge without giving any warning or waiting for his return. In the absence of any explanation the only inference is that he was negligent at common law. Mr. Lloyd-Jones submits that as the shot-firer's duties have been precisely defined by the regulations the plaintiff cannot rely on the breach of common law duty. If this is right, and the plaintiff's claim must be based on Williams' breach of his statutory duty, and if the point canvassed in *Harrison's* case [4] were to be decided in favour of the defendants, the plaintiff could have no claim based on Williams' acts. If these submissions were right those who have described this type of legislation as remedial would have to reconsider their epithet. It is, in my view, plainly wrong.

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[2] [1951] A.C. 639, 658–9.

[3] Ibid. 653.

[4] Ibid. 639.

If statutory regulations had never been made the plaintiff would, once the defence of common employment was abolished, have had his remedy at common law. The regulation makes it a criminal offence for a shot-firer to do or omit to do certain things. Some of the duties so imposed may be the same as the duty to take reasonable care at common law. Some may go beyond the common law duty. But I cannot see any ground for the submission that it should be construed as taking away civil rights at common law. Claims are constantly made for damages for negligence at common law or in the alternative, on the same facts, for breach of statutory duty under the Factories Act. In such a case the result is normally, perhaps always, the same if the claim is made out under either head. It could not be suggested that if the claim is a breach of statutory duty it cannot be negligence at common law. The courts have frequently decided that the plaintiff is entitled under both heads. If it is sought to distinguish such cases on the ground that the Factories Act places the duty on the occupiers that fact would make the application of the principle slightly less anomalous than in the present case.

The only effect of statutory provisions of this character on the common law, that I know of, does not assist the argument. If an Act or regulation has, for example, prescribed in detail a system of work for a particular type of operation, it is difficult, though not legally impossible, to establish that an employer who has carried out the statutory provisions has failed, for example, to have a reasonably safe system. The reasonable employer is entitled to assume, prima facie, that the dangers which would occur to a reasonable man have occurred to Parliament or the framers of the regulations. This line of argument, and that is all it is, affords no support to the argument under consideration.

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[4] [1951] A.C. 639.

The question then is whether the defendants have a defence in whole or in part to the plaintiff's case. The first question is that of causation. It seems to me impossible to suggest that the fact that the plaintiff, with the agreement of Williams, was connecting the wires was the cause of the accident. The cause of the accident was the later, independent and unexplained negligence of Williams. The fact that Williams knew of, and had agreed to, the plaintiff's staying to do this work is simply a circumstance aggravating the negligence of Williams. It was not a case where a shot-firer might fire a shot without warning, having no reason to believe that anyone was there.

We were referred to *Stapley* v. *Gypsum Mines Ld.*,[5] which emphasizes by contrast the conclusion to which I have come. Two men, S and D, of equal status, were ordered by their foreman to bring down a piece of roof found to be dangerous. After some unsuccessful efforts they desisted and proceeded to work disregarding the danger from the roof. S was killed by the roof falling. The defendants were held to be in breach of statutory duty, but that breach was held not to be the cause of the death. The judge had held that the defendants, as the employers of D, were liable to the widow for half the damage. In this court it was held that S, if he had been injured, could not have recovered since there was no act of negligence on D's part which was not fully and wholly his own. Nor, S having died, could his widow. As Birkett L.J. put it, the sole cause of S's death was his own breach of duty in resuming his normal work under the dangerous roof. The principle laid down in that case would have been applicable if the effective cause of the injuries had been the connecting of the wires and not, as I hold, the later independent negligence of Williams.

It is then said that the plaintiff cannot recover as he was, at the moment of the accident, doing by agreement with Williams an act contrary to the regulations. This argument is said to be supported by a decision under the Workmen's Compensation Act, *M'Aulay* v. *James Dunlop & Co. Ld.*[6] In that case a miner was killed while connecting the wires to the detonator in breach of the regulation which we are considering. A previous shot had been fired and the foreman was not aware that the miner had gone to the detonator. The handle of the firing battery had jammed and the foreman was moving it backwards and forward in order to free it. While doing this the wires having been connected to the detonator, without the foreman's knowledge, the circuit was completed and the explosion occurred. No question of negligence by the foreman, of course, arose, and it is difficult to see how it could have been suggested. The question was whether the accident arose out of and in the course of the man's employment, and section 7 of the Workmen's Compensation Act, 1923, which provided, in effect, that a breach of statutory duty by the workman did not in itself prevent the accident being held to be within the words of the Act, fell to be considered. The House held that the claim failed on the ground that what the man was doing was not within the scope of his employment at all. He was doing something which he was not engaged to do and section 7, therefore, had no application.

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[5] [1952] 2 Q.B. 575.

[6] [1926] A.C. 377; 42 T.L.R. 397

An earlier decision of the House of Lords, *Smith* v. *Fife Coal Co. Ld.*,[7] which was not cited in *M'Aulay's* case,[8] was very close on its facts. There the shot-firer had, in breach of the regulation, handed the cable to the plaintiff to connect to the detonator. The shot-firer, without waiting until the man had got to a place of safety and without ascertaining that all persons in the vicinity had taken shelter, fired the shot. It was held that the cause of the accident was not the unauthorized assumption by the plaintiff of the shot-firer's duty, but premature firing by the shot-firer, and the finding of the arbitrator that the injury arose out of and in the course of the plaintiff's employment was not disturbed. The plaintiff in that case had finished the connecting of the wires and just turned to go when the explosion took place. The two cases were considered in *Pollock* v. *Mount Vernon Colliery Co. Ld.*[9] The facts were, as it seems to me, identical in all relevant respects with those in *Smith's* case,[7] except that the plaintiff was in the act of connecting the cable when the shot was fired. Obviously contact must have been made. *Smith's* case [7] was distinguished on the ground that in that case the prohibited act had been completed, whereas in *Pollock's* case [9] the accident arose out of and in the course of the prohibited act.

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[7] [1926] A.C. 377; 42 T.L.R. 397.

[8] [1914] A.C. 723; 30 T.L.R. 502.

[9] [1931] A.C. 597; 47 T.L.R. 485.

It is unnecessary to consider these cases in detail. I will assume that on the facts here the plaintiff could not have recovered under the Workmen's Compensation Acts if they had been still in force. The fact, however, that he was doing an act prohibited by the regulation does not take him out of the protection of the common law so that he can be negligently injured with impunity. There is a regulation that no person shall sleep while below ground in the mine (General Regulation 19). No one could suggest that if such a man was seen asleep in the vicinity of a place where a shot was to be fired no duty was owed to him by the shot-firer, although the sleeper was no doubt doing something outside his employment which he was not engaged to do and which was an offence under the regulations. Examples could be multiplied from other areas. A motorist driving at 35 miles an hour in a built-up area is committing an offence, but if he is negligently injured by another motorist he has a right of action. His own unauthorized speed is, of course, relevant to causation or contributory negligence, but it may be held not to have been either the effective or a contributory cause.

On causation, which, as *Pollock's* case [9] shows, is not the relevant consideration in the Workmen's Compensation Act cases, the view which I have expressed is supported by a passage in Lord Dunedin's speech in *Smith* v. *Fife Coal Co. Ld.*[10]: "I think "I can best make my view clear by taking the case of *Kerr* v. "*William Baird & Co. Ld.*[11] and contrasting it with this. In "that case the miner arranged a shot and fired it entirely by "himself—I mean without the presence or help of the shot-firer "at any stage of the proceeding. It was held rightly that the "accident was due to the action of the man, and that such action "consisted in taking upon himself duties which he had no right "to perform. Here, on the contrary, the miner did not arrange "and fire the shot. One part of the composite action was his "duty—to insert and stem the detonator—and that he did. The "next step—the connecting of the detonator wire to the cable—"he had no business to do, and in doing it he did something "which was not in the sphere of his employment. But two more "stages are necessary before we arrive at the explosion which "causes the injury and forms the accident, namely, the connecting of the cable to the battery and the putting the battery "into efficient action by the turning of the handle, and both "these stages are done by the shot-firer. In the circumstances

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[9] [1931] A.C. 597; 47 T.L.R. 485.

[10] [1914] A.C. 723, 729.

[11] 1911 S.C. 701.

"I cannot bring myself to see that the efficient cause of the "accident was connected with the arrogation of unauthorized "duty by the miner. It is true that no explosion could have "taken place unless the cable had been connected with the "detonator. But that is only a remote cause sine qua non, and "one in which the relation of the appellant to the act as distinguished from any other person is immaterial."

Applying those principles, it seems to me that the plaintiff is not precluded by the fact that he was doing the prohibited act in question from relying on his rights at common law. It was suggested at one time that, having regard to the statutory provisions as to shot-firers, Williams ought not to be regarded as the servant of the defendants. This was not persisted in and is, I think, clearly wrong. The defendants are therefore liable for the injuries caused by the negligence of Williams. As in my opinion, following Lord Dunedin, the doing of the prohibited act was only a remote cause sine qua non, I can see no ground for holding that the breach of statutory duty afforded any ground for reducing the damages recoverable. Nor do I think that the plaintiff was negligent at common law for reasons which I have already given. He had no reason to anticipate the danger which overtook him.

The position with regard to the defendants' liability for Williams' breach of statutory duty does not therefore arise. Nor does a further point made by the plaintiff to which I should refer. There was a body of evidence called by the plaintiff to the effect that in this mine it was the common practice for miners, at the request of or with the agreement of shot-firers, to couple up the cable to the detonator. This evidence was, I think, called primarily in support of a submission that the managers knew, or ought to have known, of the practice. This was negatived by the judge. It was also relied on in a different way. Shot-firers are officials with duties and responsibilities, as the Act and the regulations show. It was submitted that, although the defendants and the mine managers had fulfilled their duties under the Act and regulations in doing their best to enforce the system as laid down in the regulations, the plaintiff could rely on a de facto dangerous system if, as here, it was acquiesced in or organized by responsible officials within admittedly the scope of their responsibilities. This point does not arise, but I thought it right to observe that it had been made.

For these reasons I would allow the appeal and enter judgment for the plaintiff for £2,400 damages, the sum assessed by the

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judge in the event of liability being established, with which the defendants do not quarrel.

BIRKETT L.J. Speaking for myself, I have had the opportunity of considering with some care the judgment of Somervell L.J. which I have just read. I desire to express my agreement with it and I do not desire to add to it.

ROMER L.J. I also am in full agreement with the judgment of Somervell L.J., and there is nothing I wish to add.

Appeal allowed.

Solicitors: *Theodore Goddard & Co., for Morgan, Bruce & Nicholas, Pontypridd; R. S. S. Allen, for W. H. F. Barklam, Cardiff.*

A. W. G.

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Evershed M.R., Jenkins and Romer L.JJ.

BRITISH TRANSPORT COMMISSION v. LONDON COUNTY COUNCIL.

Transport—Charges scheme—Alteration of existing scheme—Transport Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 49), *ss.* 76, 77, 78, 79.

Statute—Repeal—Repeal of other enactments to which it "applies"—Meaning—Right of appeal from Transport Tribunal—Railway and Canal Traffic Act, 1888 (51 *&* 52 *Vict. c.* 25), *s.* 17—*Railways Act*, 1921 (11 *&* 12 *Geo.* 5, *c.* 55), *s.* 26—*Transport Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 49), *sch.* 10, *para.* 5—*Railway and Canal Commission (Abolition) Act*, 1949 (12 *&* 13 *Geo.* 6, *c.* 11), *s.* 8 (2).

Section 8 (2) of the Railway and Canal Commission (Abolition) Act, 1949, repealed, inter alia, section 17 of the Railway and Canal Traffic Act, 1888, " and any other enactment in so far as it applies " any enactment so repealed . . ." That section provided for appeals from the Railway and Canal Commission to the Court of Appeal.

Section 26 of the Railways Act, 1921, provided that section 17 of the Act of 1888 " shall apply in respect of appeals from the " Railway Rates Tribunal " in like manner as it applies to appeals " from the Railway and Canal Commission." Paragraph 5 of Sch. X to the Transport Act, 1947, provided that section 26 (inter alia) of the Act of 1921 " shall apply with respect to the " jurisdiction conferred on the Transport Tribunal by this Act " . . ."

Counsel for both parties to an appeal from the Transport Tribunal to the Court of Appeal argued that the right of appeal from the tribunal so conferred did not cease to have effect by virtue of section 8 (2) of the Act of 1949, although, at first sight, that was its effect:—

Held, that the right of appeal from the Transport Tribunal subsisted:—

Per Evershed M.R., because what paragraph 5 was applying to the Transport Tribunal was section 26 of the Act of 1921, not section 17 of the Act of 1888, although section 26 derived its force from section 17;

Per Jenkins L.J., because section 26 did not " apply " section 17 within the meaning of section 8 (2), but created a wholly new right of appeal by adapting to a new purpose the language of section 17;

Per Romer L.J., because there was a hiatus in section 8 (2) which the court was entitled to fill, having regard to the purpose of the Act, history of the matter and probabilities: no object was provided for the word " applies," and its object must be regarded as the Railway and Canal Commission; section 26 applied section 17, and paragraph 5 applied section 26, but applied it not to the Commission but to the Transport Tribunal.

By section 76 of the Transport Act, 1947, the British Transport Commission is required to make draft charges schemes, and to submit them for approval and confirmation to the Transport Tribunal constituted under that Act. Section 79 makes provision for applications to be made to the tribunal for the alteration of existing schemes, but provides that no application for alteration shall be entertained by the tribunal until at least one year has elapsed since the scheme which it is sought to alter came into force.

Within 12 months of the coming into force of a charges scheme of 1952, the British Transport Commission applied to the tribunal for confirmation of a document entitled a draft charges scheme, which provided for a substantial increase in charges. The London County Council, one of a number of objectors to the scheme, raised the preliminary objection that the document was not in truth a draft charges scheme, but was only an alteration to the existing scheme of 1952, and that it was, therefore, premature. The tribunal considered the objection and decided against it. The London County Council appealed.

Held, that the tribunal were not bound to reject the draft charges scheme, for there was nothing in the Act of 1947 which restricted the right of the Commission to submit schemes at any time, and though the proposed scheme followed the general lines of the existing scheme of 1952, it was a new scheme, properly submitted under section 76, of that Act, and was not merely an alteration of the existing scheme within section 79. The subject-matter of sections 76 to 78 on the one hand and section 79 on the other was not mutually exclusive.

Decision of the Transport Tribunal upheld.

APPEAL from the Transport Tribunal.

On January 5, 1953, the British Transport Commission set up by the Transport Act, 1947, applied to the Transport Tribunal under sections 76, 77 and 78[1] of that Act for approval

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[1] Transport Act, 1947, s. 76: "The Commission" [the Transport Commission] "shall from time to "time prepare, and submit to the "Transport Tribunal for confirma- "tion, drafts of schemes (hereafter "in this Act referred to as 'charges "'schemes') for determining, . . . "(*a*) the charges . . . to be made by "the Commission; and (*b*) where it is "necessary or expedient so to do, the "other terms and conditions which "are to be applicable to the provision "of those services and facilities . . . "and it shall be the duty of the Com- "mission, within two years from the "passing of this Act or such longer "period as the Minister may allow," [a longer period has been allowed] "to prepare and submit the draft of "a scheme or, as the case may be, "drafts of a series of schemes . . ."

S. 77 (1): "A charges scheme may, "as respects any of the services and "facilities to which it relates, adopt "such system for the determination "of the charges, or, as the case may "be, the charges and other terms and "conditions, which are to be applic- "able as may appear desirable, and "in particular and without prejudice "to the generality of the foregoing "words [it may] (*a*) provide . . . for "fixed charges, maximum charges, or "standard charges . . . ; (*b*) provide "in any such case for minimum "charges; (*c*) provide for alternative "sets of terms and conditions; . . ."

Subs. (2): "A charges scheme may "revoke or amend any previous "charges scheme."

S. 78: "(1) When the Commission "have submitted a draft of a charges "scheme to the Transport Tribunal, "the Commission shall publish it in "such manner as the tribunal may "direct, together with a notice "specifying . . . the manner . . . "in which objections to the draft "scheme and other representations "with respect thereto may be lodged "with the tribunal. (2) An objection ". . . may be lodged by . . . (*b*) any "body constituted for the purposes of "any scheme for the carrying on, "under national ownership or control, ". . . of any undertaking. . . . (6) It "shall be the duty of the Commission "to give to the tribunal all such "assistance as is necessary or as the "tribunal may require for the pur- "pose of deciding whether or not to "confirm the scheme with or without "alterations."

S. 79 (1): "An application for the "alteration of a charges scheme may "be made to the Transport Tribunal "either—(*a*) by the Commission; or "(*b*) by any body representative of "any class of persons using any "services . . . being persons whose "interests will be affected . . . (*c*) by "any body constituted for the pur- "poses of any scheme for the carrying "on, under national ownership or "control, . . . of any undertaking, ". . . (*d*) if . . . the scheme so pro- "vides, by any other person using "any services or facilities to which "the scheme relates, . . . Provided "that the tribunal shall not enter- "tain any application under this "section for the alteration of any "scheme if—(i) less than 12 months "have elapsed since the coming into "force of the scheme; . . ."

Para. 5, Sch. X: "Subject to the "provisions of this Act, sections 22 to "26 of the Railways Act, 1921 (which "contain provisions with respect to "the constitution and procedure of, "and appeals from, the Transport "Tribunal) shall apply with respect "to the jurisdiction conferred on the "Transport Tribunal by this Act as "they apply with respect to the juris- "diction conferred on them by that "Act."

Railway and Canal Commission (Abolition) Act, 1949, s. 8 (2): "The "enactments mentioned in the Sche- "dule . . . are hereby repealed to the and confirmation of the British Transport Commission (Passenger) Charges Scheme, 1953, by which it was proposed to make certain alterations in fares and, in particular, to increase fares within the London area. A number of persons and bodies gave notice that they opposed the application, and one of those opponents, the London County Council, by a document dated January 30, 1953, gave notice that they wished to raise a preliminary objection to the hearing by the tribunal of the Commission's application. The grounds of the objection stated in the notice were: "This application is not an application for a con-"firmation of a charges scheme within the meaning of sections 76, "77 and 78 of the Transport Act, 1947. The application is not "one which the Transport Tribunal can entertain by reason of "the provisions of section 79 (1) of the Transport Act, 1947, the "application having been made by the applicants less than 12 "months after the coming into force of the scheme of 1952." The tribunal directed that that objection should be heard as a preliminary question, and on February 17, the tribunal made the following order: "So much of the objection lodged by the "London County Council" (and certain other objectors associated themselves with the London County Council) "as relates "to the jurisdiction of the tribunal to hear this application be "rejected."

The London County Council served a notice of appeal against that order and asked that the application of the Commission be dismissed on the grounds stated in the notice of objection of January 30. As the hearing of the application on its merits had been fixed to begin on Monday, March 9, it was arranged, on the application of the appellants, supported by the respondents, to give an early hearing to the appeal.

H. V. Lloyd-Jones Q.C. and *L. MacLaren* for the London County Council. The first question is whether a right of appeal is in existence at the present time. Prima facie the legislature intended to give a right of appeal on any matters of law decided by the tribunal, and this case is, undoubtedly, an appeal on a question of law since it depends on the construction of sections 76 to 79 of the Transport Act, 1947. A difficulty has, however, arisen because it is now thought that the right of

"extent specified . . . [section 17 of "the Railway and Canal Traffic Act, "1888, being specified, except in so "far as it applied to Northern Ireland] and any other enactment in "so far as it applies any enactment so "repealed shall cease to have effect."

appeal plainly given by the Act of 1947 may, by hitherto unperceived inadvertence, have been abrogated by section 8 (2) of the Railway and Canal Commission (Abolition) Act, 1949.[1] Any such abrogation could not have been intended for rule 60 of the Transport Tribunal Rules, 1949 (S.I. 1949, No. 989), deals with the right of appeal from the tribunal on the clear assumption that the right still subsists, and those rules were made after the passing of the Act of 1949. Further, it seems most unlikely that the right of appeal which had been specifically conferred in 1947 would be taken away by a side-wind so soon afterwards.

Section 8 (2) of the Act of 1949 repeals section 17 of the Act of 1888 and "any other enactment in so far as it applies "any enactment so repealed." It is submitted that that does not touch the right of appeal from the Transport Tribunal provided by para. 5 of Sch. X to the Act of 1947, for that right is derived from section 26 of the Railways Act, 1921, and not from the repealed section 17 of the Railway and Canal Traffic Act, 1888. Section 26 refers to the repealed section 17, but only does so for convenience of drafting and in order to describe the ambit and mode of appeal which was being provided from the newly created Rates Tribunal. There is no incorporation of section 17 of the Act of 1888, or application in the sense of section 8 (2) of the Act of 1949, when section 26 of the Act of 1921 provides that a right of appeal shall exist from the Rates Tribunal "in like "manner" as it had previously existed from the Railway and Canal Commission. Applying the general rule of construction that where words in one statute are adopted in a later statute, the repeal of the earlier will not ipso facto affect the later provision, I submit that, notwithstanding the repeal of section 17 of the Act of 1888, section 26 of the Railways Act, 1921, is still in force.

Even if section 26 has to be taken as applying or incorporating section 17 of the earlier Act, para. 5 of Sch. X to the Act of 1947 is still unaffected by the Act of 1949, for it does not apply section 17 in the relevant sense. The right of appeal springs from the Act of 1921 and only indirectly from the Act of 1888.

On the construction of the Act of 1949 itself, it is submitted that it is clear that section 8 (2) cannot apply to the Transport Tribunal. The context of the Act as a whole, including the long title (and it is legitimate to have regard to the context in order to understand the intention of the Act), shows that the Act

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was intended to dispose of the Railway and Canal Commission and to clear away any vestigal remains of statutes dealing with that Commission. The Act of 1949 had no direct link with the Transport Tribunal and it is submitted that the court would seek to avoid a construction which gives an absurd result, having regard to the Act as a whole. There is, further, a presumption against implicit alteration of law. General words and phrases are usually construed as limited to the actual objects of an Act. Counsel referred to Maxwell on Interpretation of Statutes, 9th ed., p. 25, where he cites Goddard L.J. in *Pratt* v. *Cook, Son & Co. (St. Pauls) Ld.*[2] as upholding a proposition of Lord Lindley in *Thomson* v. *Clanmorris*,[3] that regard must be had to the history of an Act and to the reasons which led to it being passed, as well as to the actual words used. At p. 236 the learned author states that it is permissible to interpolate words into a statute in order to avoid absurdity. Here the intended sense would, I submit, be attained if the repeal of any enactment applying the statutes repealed in the Schedule to the Act of 1949 were to be limited to "any statute in relation to the Railway and Canal Commission."

[Romer L.J. But if Maxwell's proposition is that the court must assume that the legislature has not meant what it has said, and, having imagined the intended meaning, must alter the plain language of the statute, he is stating a dangerous doctrine. To alter the plain language of a statute would seem to be usurping the functions of the legislature.]

Generally that would be so but in a given case there may be an irresistible presumption that the words used lead to a result which was not intended by the legislature.

[Romer L.J. If this proposition is accepted it means that the functions of the court in construing statutes are wider than in relation to wills, for the court cannot in construing a will go behind the words used by the testator to give effect to his probable, but unexpressed, intention.]

There is (see Maxwell, p. 134) a presumption against ousting the jurisdiction of a superior court. Section 8 (2) of the Act of 1949 should not readily be construed as ousting the jurisdiction which, having regard to the history of this legislation had been plainly conferred ever since 1888 if the apparent abolition was by a mere slip. It must be presumed that the abolition was not intended.

[2] [1939] 1 K.B. 364, 382.

[3] [1900] 1 Ch. 718, 725.

Charles Russell Q.C. and *E. S. Fay* for the British Transport Commission (but on the first point supporting the submission of the London County Council). The right of appeal from the Transport Tribunal subsists, for on its true construction the Act of 1949 only touches matters which are consequential on the declared purpose of that statute. It is significant that careful saving is made of the functions of the abolished Commission which had been transferred to Northern Ireland and were exercisable by the Northern Ireland Transport Tribunal. The right of appeal from the Northern Ireland Transport Tribunal clearly subsists and it would be odd if the corresponding right in respect of this tribunal had been taken away, particularly by a statute which purports to deal with the entirely distinct Railway and Canal Commission. Such a provision would travel completely outside the declared purpose in the long title of the Act of 1949 and it would be contrary to the general trend of that Act, which is otherwise careful in approach. Section 8 (2) uses general words but it is, I submit, wrong to take the section in isolation. It must be construed as part of the whole in order to decide whether, on the fair construction, the words used in section 8 (2) must be read in the fullest generality. Section 8 (2) is consequential on the rest of the Act; it sweeps up the loose ends, and that is not the sort of section in which general words should be taken to attack matters which go beyond the subject-matter of the body of the Act. [He referred to *Cox* v. *Hakes*.[4]] I submit that section 8 (2) does not touch either section 26 of the Act of 1921 or para. 5 of Sch. X to the Act of 1947.

[ROMER L.J. Section 8 (2) is elliptic. It states the subject of the enactments but not the object. The submission in effect is filling the gap in the statute by inference from the long title of the Act. It seems that the object should be the Railway and Canal Commission.]

Lloyd-Jones Q.C. and *Leon MacLaren.* The second question is whether the draft charges scheme put forward by the British Transport Commission is, as it purports to be, a new scheme or merely a proposal to alter an existing scheme. If the latter, it will be caught by the proviso to section 79 of the Act of 1947, for the Commission admit that it has been put forward within 12 months from the confirmation of the existing scheme of 1952 (or more exactly within a year of the date on which the last stage of the scheme of 1952 came into force). If the document is compared with the existing scheme, it is clear that it is merely an alteration and not a new draft scheme. The general lines are the same in both (subject only to minor alterations in manipulative machinery because one document is a draft scheme and the other has been confirmed). The only new matter is an addition in the schedule of small sums chargeable for services rendered by the Commission in the London area. The explanatory document issued by the Commission, accompanying the scheme, emphasizes the absence of any major alterations. Had there not already been an existing scheme substantially the same as this, I would concede that this might be a valid scheme, for it is a scheme in form, but the substance is the vital matter and not the form.

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[4] (1890) 15 App.Cas. 506, 526.

Section 79 (1) (iii) provides that major alterations may necessitate a new scheme but section 79 only comes into operation when 12 months have elapsed since the coming into force of a scheme. The tribunal can then decide whether the proposed alteration should, as a matter of degree, be dealt with by a new scheme.

[EVERSHED M.R. If a new scheme is put forward the whole scheme is open to inquiry.]

[JENKINS L.J. And that is a safeguard against new schemes being put forward merely to circumvent the time limit when an alteration would be sufficient.]

The Act appears to envisage a scheme as being a considered outlook, one matter being integrated with others. The word is not used elsewhere in the Act. Section 77 refers to a " system " or method. A scheme contemplates inter-relation and co-relation of various charges, providing a kind of balance between one charge and another. In this case there is no change in the " scheme " in that sense, and it seems that the Commission are seeking to take advantage of the language of the statute to make what is merely an alteration within 12 months in order to meet an immediate financial embarrassment. The onus is on them to show that they are implementing the duty imposed by section 76 and that the scheme is produced in accordance with that duty.

The definition of " alteration " in section 125 of the Act includes an addition to the charges. There is no specific requirement in the Act that a new scheme must comprise something more than mere alterations of an existing scheme, but it is plain

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from section 79 that the legislature made a distinction between mere alterations and new schemes.

[Romer L.J. But section 79 (1) (iii) indicates that a proposal for alteration, falling short of being a scheme may, because of the magnitude of the changes proposed, be better dealt with by a scheme.]

Unless a "scheme" means something more than mere alteration, it would be possible for the Commission to defeat the intention of section 79 by introducing new schemes, for time would have to begin again from the confirmation of each new scheme. Further, it is curious to find a time limit on bringing mere alterations but none on a new scheme.

In fact, this is a mere alteration of the existing scheme. I do not contend that once the Commission have a scheme all further amendments must necessarily only be made under section 79, for the Act refers to "amended schemes," but I submit that "amendment" there refers to something beyond mere alteration of charges. For example, if the Commission extended operations to different places a new scheme might be required to deal with that "amendment," particularly if the Minister had asked for review under section 80. Similarly if the various areas were reshaped, or if other responsibilities were undertaken by the Commission. But provision for mere alteration is made in section 79 and, prima facie, it should be used. It is not advantageous to have frequent new schemes, for time is necessary to see how a scheme works. It is true that elasticity is desirable, but the schemes should leave scope for flexibility, and the time limit, having regard to the time which would be taken to bring in a new scheme, is not harsh. [He referred also to the time limit of 12 months in rule 48 of the Transport Tribunal Rules, 1949 (S.I. 1949, No. 989).]

If this scheme is held to be valid, it means that the time limit in section 79 will not prevent the Commission from applying to have their schemes changed at any time.

[Jenkins L.J. But the power to submit schemes only means that the tribunal have jurisdiction to consider the application; no doubt they would reject frivolous applications and order the applicant to pay the costs.]

Russell Q.C. and *E. S. Fay.* The document is, beyond doubt, a draft charges scheme and not merely proposals for alteration. It is in the form of a charges scheme and the form is vital. It is said that an application to the tribunal must be either a scheme or proposals for alteration, but section 79 shows that that is wrong and that the two things overlap; the same change may be labelled an "alteration" or may be embodied in the form of a scheme. It is entirely at the option of the Commission whether a proposal for change of an existing scheme is put forward to the tribunal in one form or the other. If they choose to submit a new scheme the whole scheme is open to debate, whereas, if an alteration is submitted under section 79, discussion will be limited, but the Commission will have to delay making the application until at least 12 months have elapsed, and then, if important changes are proposed, they may be required by the tribunal under section 79 (1) (iii) to reshape their application and submit it in the form of a scheme. Technically, even a minor matter can be the subject of a new scheme, and there may be cases where it is essential to be able to bring in a new scheme quickly even on small matters; that is why it would be undesirable that the powers of the tribunal should be fettered. The limit imposed by section 79 does not exclude the Commission because the other provision is available and it is unlikely that the Commission, being a public body, would abuse that other power and, by bringing forward schemes, provoke public inquiries and incur considerable expense, unnecessarily. There is no defect in this part of the statute which impels the court to imply that the Commission is restricted from bringing in new schemes whenever necessary. There is no time limit on the right of the Minister to ask for review under section 80 and anyone can go to him within the time limit of section 79 if necessary. There are, therefore, three procedures open if amendment is required: (a) by a new scheme under section 76, if the amendment is desired by the Commission, (b) by alteration under section 79, and (c) by application by the Minister under section 80. That produces a logical result. [He was stopped.]

EVERSHED M.R. stated the facts and continued: It seemed to the court, at first sight, that there was a possible objection to the hearing of the appeal in that there might not be any right to appeal on this matter from the Transport Tribunal to this court. Mr. Lloyd-Jones, for the London County Council, argued that such a right of appeal lay, and it has been made apparent by Mr. Russell, for the British Transport Commission, that on this particular point he desired to support the submission of the London County Council. We heard argument from Mr. Lloyd-Jones and we also, in the circumstances, thought it proper to ask Mr. Russell if he desired to add anything to Mr. Lloyd-Jones' argument. It need hardly be said that if there is by statute no jurisdiction in this court to hear the appeal, jurisdiction cannot be conferred by the joint request or submission of two interested parties. Though both parties before us desired the substantive appeal to be heard, it seemed to us that it would be wrong for the court to entertain the appeal on its merits unless we were first satisfied that we had jurisdiction to hear it. I must, therefore, deal first with that matter. To do so adequately, it is necessary to embark on an historical review beginning with the Railway and Canal Traffic Act, 1888. By section 2 of that Act it was provided: "On the "expiration of the provisions of the Regulation of Railways Act, "1873, with respect to the Commissioners therein mentioned, "there shall be established a new Commission, styled the 'Rail-"'way and Canal Commission' (in this Act referred to as 'the "'Commissioners'), and consisting of two appointed and three "ex officio Commissioners. . . ." The Act then went on to vest in the Commissioners so appointed a considerable jurisdiction in matters mentioned in the Act of 1888. Section 17 of the Act provided: "(1) No appeal shall lie from the Commissioners upon a "question of fact, or upon any question regarding the locus "standi of a complainant. (2) Save as otherwise provided by this "Act, an appeal shall lie from the Commissioners to a superior "court of appeal. . . ." By the definition section [section 55] the "superior court of appeal" meant, so far as England was concerned, the English Court of Appeal. Subsection (6) provided: "Save as provided by this Act, an order or proceeding of "the Commissioners shall not be questioned or reviewed, and "shall not be restrained or removed by prohibition, injunction, "certiorari, or otherwise, either at the instance of the Crown or "otherwise."

The Railways Act, 1921, established, for certain limited purposes, particularly the approval and confirmation of railway rates, a new tribunal known as the Railway Rates Tribunal. It is, however, vital to bear in mind that the Railway and Canal Commission were not thereby superseded nor were their functions brought to an end; indeed, they continued to exercise their original jurisdiction over a considerable field. But as regards railway charges, the powers which previously had been exercised by the Railway and Canal Commission were transferred to the newly created Railway Rates Tribunal. The functions of the tribunal were specified in section 28 of the Act, and for present purposes I need not refer to them further. Section 26 is the vital section:

" Section 17 of the Railway and Canal Traffic Act, 1888, shall " apply in respect of appeals from the rates tribunal in like " manner as it applies to appeals from the Railway and Canal " Commission. . . ." The undoubted effect of that section, as I understand it, is that, in respect of matters brought within the jurisdiction of the Railway Rates Tribunal, a right of appeal to the Court of Appeal in England was constituted which was similar in all respects to the right of appeal from the Railway and Canal Commission conferred by section 17 of the Act of 1888.

The third Act which has to be considered (and which is for present purposes the vital Act) is the Transport Act, 1947. That Act, in popular language, among other things, nationalized the British railways. Among other provisions it adopted for its own purposes the Railway Rates Tribunal, but gave it the new name or title of the Transport Tribunal. It also transferred to the Transport Tribunal (the old Railway Rates Tribunal) part, but by no means the whole, of the remaining jurisdiction hitherto exercised by the Railway and Canal Commission. Section 72, after stating certain amendments which were to be made to the Railways Act of 1921, provides by subsection (3): " The provisions " of the Tenth Schedule to this Act shall have effect with respect " to the powers and procedure of the Transport Tribunal." That Schedule is headed " Provisions as to the Transport " Tribunal." Paragraph 1 provides: " The Transport Tribunal " shall, for the purposes of the exercise of any of their functions " under this or any other Act, have full jurisdiction to hear and " determine all matters whether of law or of fact, and shall, as " respects the attendance and examination of witnesses, the " production and inspection of documents, the enforcement of " their orders, the entry on and inspection of property and other " matters necessary or proper for the due exercise of their said " jurisdiction, have in England all such powers, rights and " privileges as are vested in the High Court and in Scotland " all such powers, rights and privileges as are vested in the " Court of Session, and execution may be had in England on " any of their orders as if it were an order of the High Court." Paragraph 5 reads: " Subject to the provisions of this Act, " sections 22 to 26 of the Railways Act, 1921 (which contain " provisions with respect to the constitution and procedure of, " and appeals from, the Transport Tribunal) shall apply with " respect to the jurisdiction conferred on the Transport Tribunal

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"by this Act as they apply with respect to the jurisdiction conferred on them by that Act."

The relevant section for present purposes is, of course, section 26 of the Railways Act, 1921, which, as I have said, made applicable to the old Railway Rates Tribunal, and to matters which were heard by that tribunal, the provisions as regards appeals which formerly had been applicable to the Railway and Canal Commission by section 17 of the Act of 1888. If, therefore, the matter had rested there, it cannot, I conceive, be in doubt that there would have been after the passing of the Transport Act, 1947, a right of appeal to the Court of Appeal in England on matters of law and so forth, from the decisions or orders of the Transport Tribunal.

The question which is sought to be brought before this court in the present appeal has been described as a question of the jurisdiction of the Transport Tribunal. It is whether, if the Transport Tribunal acted, or purported to act, in excess of their jurisdiction, or held that they had jurisdiction when they had not, there would be an appeal from such a conclusion to the Court of Appeal. On that general question it is unnecessary to express any opinion. The problem which has arisen in this case, as formulated by the notice of objection, though it is in a sense one of jurisdiction, is not a question of jurisdiction in the sense in which the phrase is used where a tribunal have purported deliberately to go altogether outside the ambit or scope of their powers. The substance of this preliminary question is whether the particular application made by the Transport Commission falls within section 76 or section 79 of the Transport Act, 1947. The Transport Tribunal decided that it fell within section 76, and, as will appear hereafter, that is a matter of the construction of the Act and a question of law. I, therefore, feel no doubt that if the matter had rested with the Transport Act, 1947, alone, the order made on February 17, 1953, would have been an order which was subject to the right of appeal to this court on the part of the party dissatisfied.

From what I have said it will have been appreciated that the provisions as to appeal from these various commissions and tribunals have been conferred by an Act of Parliament making use of the device, common enough in these days, of what is called referential legislation. It has been said that this method of legislation, however convenient in the interests of brevity, may contain a trap for the unwary. If, in the present instance, the draftsmen and legislators may be said to have digged a pit, they have come ominously near to falling into it themselves; for the question with which I have to deal is whether certain words used by the legislature in an Act, passed two years after that which I have just mentioned, and entitled the Railway and Canal Commission (Abolition) Act, 1949, have destroyed all rights of appeal to this court from the Transport Tribunal (formerly the Railway Rates Tribunal). I have stated the short title of this Act of 1949, and the long title is also pertinent. It is described as "An Act to abolish the Railway and Canal Commission and "make provision for the future exercise and performance of their "functions; to amend and repeal certain enactments relating to "their functions; and for purposes connected with the matters "aforesaid." I have already said that, though a substantial part of the jurisdiction formerly exercised by the Railway and Canal Commission had by this time been transferred to the Transport Tribunal (and, it may be, elsewhere), there still remained an appreciable residuum of jurisdiction in the old Commission. The long title of the Act of 1949 makes tolerably plain the fact that Parliament was intending to direct itself, and to direct itself exclusively, to getting rid of that Commission and to making provision for the exercise and performance elsewhere of the functions which still remained with the Commission, and, in that connexion, to doing other incidental matters.

A perusal of the sections of this short Act—it contains only eight sections altogether—strongly supports that view of the exclusive intention of the legislature. A reference to section 2 in no way tends towards the view that Parliament was in any way proposing to limit any existing rights of appeal. On the contrary, section 2 made express provision for a substituted right of appeal from the tribunal to whom the functions specified in section 2 were transferred. However that may be, in section 8, the last section, Parliament proceeded to provide: "(1) This Act may be "cited as the Railway and Canal Commission (Abolition) Act, "1949, . . . (2) The enactments mentioned in the Schedule to "this Act are hereby repealed to the extent specified in the third "column of that Schedule and any other enactment in so far as "it applies any enactment so repealed shall cease to have "effect." Among the many Acts or enactments mentioned in the Schedule was the Railway and Canal Traffic Act, 1888, the Act with which I began this historical review. As regards that Act, the extent of the repeal, so far as relevant, is: "Section 17

"... except so far as it extends to Northern Ireland." It follows, therefore, that section 17, with the exception which I have mentioned and which for present purposes is irrelevant, is unquestionably repealed. But subsection (2) of section 8 also provides that any enactment "in so far as it applies" section 17 (to make particular reference to the section in question) "shall "cease to have effect." At first sight it seems difficult to think of more precise and express language by which to indicate that all statutory provisions which, on the face of them, "applied" section 17, should, from the date when the Act of 1949 came into force, cease to have any effect.

On a first view of this section of the Act of 1949 it seemed to me that Parliament had succeeded in destroying the right of appeal which in 1947 it had taken some pains to preserve and, so far as necessary, had restated in reference to the renamed Transport Tribunal. But after hearing the arguments of Mr. Lloyd-Jones and Mr. Russell, I have come to the conclusion that, viewed in its context, and with proper regard to the historical matters to which I have alluded, that is not the true meaning of the words used. There can be no doubt of the propriety of paying regard to these matters of context and history. *Cox* v. *Hakes*[1] serves as sufficient authority for that statement. I have already indicated in my historical references that when the Act of 1949 was passed, the Railway and Canal Commission were still in existence and they still had a certain jurisdiction. The obvious and declared (though limited) purpose of the Act of 1949 was to remove altogether from the legal scene this somewhat emasculated Commission with all their remaining powers, and to make provision for other tribunals to assume the functions which had formerly been vested in the Commissioners. There is no hint anywhere in this Act of any intention on the part of Parliament to deal with the Transport Tribunal, or with any of its functions or jurisdiction, or with the right of appeal from that tribunal which was regulated by the other Acts, particularly by the Act of 1947. On the contrary, I have already said that section 2 of the Act of 1949 seems to me to point clearly in the other direction, showing, as it does, that Parliament was not intending to take away a right of appeal which had previously existed.

The question, as I understand it, which this court has to decide, is whether subsection (2) of section 8 of the Act of 1949 had the effect of making inoperative para. 5 of Sch. X to the Act of 1947.

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[1] (1890) 15 App.Cas. 506; 6 T.L.R. 465.

Paragraph 5 provides, so far as relevant: "Section 26 of the Railways Act, 1921 (which contains provisions with respect to . . . appeals from the Transport Tribunal), shall apply with respect to the jurisdiction conferred on the Transport Tribunal." Is that enactment an enactment "applying" section 17 of the Act of 1888? I have come to the conclusion that it is not. It seems to me, in the light of what I have stated, that the phrase "in so far as it applies any enactment so repealed" must mean "in so far as it makes applicable to some other circumstance or tribunals or functions the provisions of section 17 of the Act of 1888." Paragraph 5 can only be said, in any event, to have that effect obliquely, or at one remove. Paragraph 5 does not "make applicable" to the Transport Tribunal, or to the functions which that tribunal perform, the terms and provisions of section 17 of the Act of 1888. It says in terms that what it is making applicable to the Transport Tribunal is the provisions of section 26 of the Act of 1921. In other words, it is making applicable to the Transport Tribunal the provisions as to appeal which had formerly applied to the Railway Rates Tribunal. Those provisions had derived their force from, and were contained in, the Act of 1921, albeit that they took their origin from the earlier provisions of the Act of 1888. It is no doubt a somewhat fine distinction, but having regard to the context and other relevant matters, it seems to me a distinction which it is necessary to make, unless a conclusion is to be reached that para. 5 is plainly in conflict with the purpose and substance of the Act of 1949. Nor do I think that the words of section 8 (2) of the Act of 1949 are so clear and compelling as to exclude my construction.

It may be possible to go further, and to say that section 26 of the Act of 1921 cannot strictly be called an enactment "applying" section 17 of the Act of 1888 to anybody or anything within the meaning of the Act of 1949; that section 26 was simply conferring upon persons who had come within the jurisdiction of the Railway Rates Tribunal a right of appeal analogous to, indeed, in all respects mutatis mutandis the same as, the right of appeal which an aggrieved person had from the orders of the Railway and Canal Commission in respect of matters which fell within the jurisdiction of that Commission. It is, however, not in my judgment strictly necessary to express a view upon that, and I prefer, for my part, not to do so. It is sufficient, for present purposes, for me to say that, whatever may be the effect of section

8 (2) of the Act of 1949 on section 26 of the Act of 1921, it did not, in my judgment, have the effect of making para. 5 of Sch. X to the Transport Act, 1947, ineffective and inoperative from the date on which the Act of 1949 came into operation. That conclusion, therefore, disposes of the first question, that is, whether we now have any jurisdiction to hear the present appeal.

Having answered that question affirmatively, I must state a little more precisely what is the nature of the issue of substance raised in the appeal. It is a question which depends on the effect of sections 76 to 80 of the Act of 1947. Section 76 is headed "Charges Schemes." [His Lordship read the section and continued:] The schemes so submitted were to deal (inter alia) with the services and facilities provided by the Commission under another section relating to railway transport. Section 77 states what are to be the contents of the charges scheme. [His Lordship read the section.] Section 78 provides for the function of the Transport Tribunal when a scheme is submitted. It also provides for the persons, or bodies of persons, who may object to the scheme. [His Lordship read subsection (6).] Section 79 reads: "(1) An application for the alteration of a charges scheme "may be made to the Transport Tribunal either (*a*) by the Com-"mission," or (*b*), (*c*) and (*d*) by other persons or bodies of persons. I note that whereas the Commission, and the Commission only, may put forward a draft charges scheme, an application may be made for alteration of a charges scheme not only by the Commission but by those other persons and bodies who may be affected by it. It is the first limb of the following proviso that has given rise to the present question: "Provided that the "tribunal shall not entertain any application under this section "for the alteration of any scheme if (i) less than 12 months have "elapsed since the coming into force of the scheme; or "—I pass over (ii)—" (iii) in their opinion the alteration is one which owing "to its magnitude ought not to be made except by an amending "scheme or as the result of such a review as is provided for by "the next succeeding section." The remainder of that section deals with the procedure on an application for an alteration of a scheme, and the important point to have in mind is that objections to an application for alteration are limited to the subject-matter of the alteration and do not entitle the objector to make his objections range over the whole subject-matter covered by the scheme.

Finally, section 80 deals with a third and independent matter: "The Minister may at any time require the Transport "Tribunal"—and, I insert, "although no application for a new "scheme has been made by the Commission or by any other qualified person"—"to review the operation of any charges scheme."

Those are the relevant sections, and the question is whether the application which the Commission have now made to the Transport Tribunal is properly within the ambit of sections 76, 77 and 78, as being a submission of a draft charges scheme. The London County Council and those who support them submit that, although at first sight this may look very like a scheme, when it is analysed more closely it is only an application to alter in certain respects, each alteration being individually trifling, the already existing scheme; in other words, it is, according to the substance of the matter, not a scheme at all but a mere alteration of an existing scheme, and since (as is admitted) it is put forward within 12 months of the coming into force of the existing scheme, the London County Council submit that the tribunal have no jurisdiction to entertain the application. The so-called scheme which the Commission have presented is a document of many pages. After some 41 paragraphs there are 10 schedules, of which the second to the tenth consist of schedules of charges, or scales of charges, applicable to a number of different sets of circumstances. If comparison is made between that document and the order of February 22, 1952, confirming the British Transport Commission's scheme of 1952, it is at once apparent that the two documents are closely alike in what may be called their design or method of approach to the problems with which they deal. It is, indeed, plain that no original or inventive ideas as regards the principles on which charges should be levied have found expression in the new draft scheme of 1953. Mr. Russell conceded that the document of 1953 clearly follows the previous scheme. The differences lie (and for practical purposes may be taken to lie exclusively) in the scaling up of the individual charges in the schedules, or of an appreciable number of them. As a matter of fact, we have been informed that if the altered schedules operate according to expectation, they would increase the annual revenue of the Transport Commission by the not negligible sum of between five and six million pounds per annum. Thus can so many halfpennies achieve so great a global result.

The question then is whether, as it may fairly be said that the new "scheme" is the old scheme with the individual charges altered so as to produce this extra revenue, it cannot be presented under sections 76 to 78. In brief, the London County Council say that the substance of this matter must be looked at, and on that test it is found that there is nothing but "alteration" of the old scheme: a "scheme" within the meaning of the Act necessarily involves the idea of pattern and design, and so long as the pattern and design in a "scheme" remains the same as it was before, it is impossible to say that the proposal is anything more than a mere alteration of the old scheme, though made to look like a new scheme. They say that, if what is proposed is mere alteration of an existing scheme, then the proposal falls within the express language of section 79 and cannot, therefore, be entertained by the tribunal until 12 months from the coming into operation of the old scheme have elapsed. That argument necessarily involves the subject-matter of sections 76 to 78 on the one hand, and the subject-matter of section 79 on the other, being mutually exclusive; that is to say, that, if what is sought is mere alteration of an existing charges scheme, the document which is to effect the alteration cannot itself be a charges scheme within sections 76 to 78. The tribunal decided that question adversely to the London County Council, and, in my judgment, rightly so decided. There is nothing in the sections which I have read which in terms makes the first three and the fourth sections mutually exclusive, or, so far as I can see, which indicates any such intention. The third proviso of section 79 (1) makes it, in my judgment, plain that there is no such exclusive character in what is called an alteration in section 79, where it is said: "Provided that the tribunal shall not entertain any "application under this section for the alteration of any scheme "if in their opinion the alteration is one which owing to its "magnitude ought not to be made except by an amending "scheme." Those words seem to me to make it plain that an amending scheme and, therefore, a scheme, may be constituted by a pre-existing scheme which has been altered.

Looking at it, as it were, from the other end, I can find nothing in sections 76, 77 and 78 which requires that, when once a scheme has been brought into operation, a second scheme is to have any particular character, such as that it must contain some new matter of principle, some new idea, some new design or pattern. It must never be forgotten that whereas an application for alteration of an existing scheme may be made either by the Commission or by one of a number of other bodies or persons, only the Commission has the right to prefer a scheme. I can, therefore, see good reason why there should be a time limit imposed on the right (which is possessed by many persons or bodies with particular interests) to apply for alterations of some detail in an existing scheme, whereas the Commission (whose functions and duties include that of trying to make the undertaking pay its way) should be entitled, at such time or times as they think fit, to prepare and submit such schemes as they think desirable.

Mr. Russell submitted that this draft scheme was ex facie a scheme, and all the more so because it was extremely like the scheme of 1952 which the London County Council themselves said was a "scheme"—indeed, it has been the burden of their whole argument that the document of 1952 is a "scheme." If that document of 1952 is a scheme, then the document of 1953, which is very like it, is a scheme also. That, says Mr. Russell, is the relevant, and is a sufficient, test. If that argument was carried to its logical conclusion it would, of course, follow that the Commission could, if they desired, prefer a new draft scheme which differed from an existing scheme only in that there were some trifling alteration in one figure in one part of one of the schedules. If they took that course they would, of course, invite all who were competent to do so to raise objections to any part of the scheme and not only to the particular figure which it was proposed to alter; in other words, the Commission would throw again, as it were, the whole contents of the scheme to the wolves. It may well be said, therefore, that it would not be a very likely thing for the Commission to do: but it may be necessary and proper to test the question by such a case as that. I do not find it necessary to express any view what the result would be if the Commission took such a course as that which I have suggested. I certainly do not, for myself, wish to suggest that the tribunal would not have power, if the Commission were in any sense abusing the process of the tribunal, to deal summarily with any application which might have that effect. But I am quite satisfied that this case, at any rate, cannot possibly be described as of that character.

It is true that in an explanatory document the Commission were, by emphasizing the smallness of the changes which they proposed, gilding the philosophic pill for those who have to swallow it. But the alterations in the charges which they propose to make cannot by any stretch of imagination, I should have thought, be called mere trivialities, when their effect is to produce an increase of five or six million pounds per annum in the revenue of the Commission. If the subject-matter to be dealt with is the charges to be made for the facilities, the obvious method of making a new scheme is to alter the figures in the various schedules in which the charges are set out. The art and skill of the scheme and its fairness will be found and judged in the way in which the various small charges are related together so as to form part of a coherent and comprehensive whole. Whatever, therefore, might be the fate of an application on a new draft scheme, the substance of which was identical with the pre-existing scheme save for one relatively trivial alteration, I, for my part, think that there is ample justification for the view that this application falls fairly and squarely within the provisions of sections 76 to 78 which the Transport Commission have sought to invoke. This is plainly not the occasion to say more about the scheme itself. The numerous objectors who are likely now to raise their voices in opposition will no doubt deal with the provisions of the scheme on their merits. For the reasons which I have stated, I think that the tribunal were rightly of opinion that the application was not one which fell within section 79, and that it was not one, therefore, which they were bound to reject. In my judgment the appeal fails and should be dismissed.

Jenkins L.J. I agree. The question whether any appeal at all now lies to this court from a decision of the Transport Tribunal, having regard to the provisions of the Railway and Canal Commission (Abolition) Act, 1949, turns on the true construction in its context of subsection (2) of section 8 of the last mentioned Act. [His Lordship read the subsection and continued:] The enactments repealed set out in the schedule include section 17 of the Railway and Canal Traffic Act, 1888. The question is whether section 26 of the Railways Act, 1921, "applies" section 17 of the Railway and Canal Traffic Act, 1888, within the meaning of subsection (2) of section 8 of the Act of 1949, and if so, whether para. 5 of Sch. X to the Transport Act, 1947, referring, as it does, amongst other sections, to section 26 of the Railways Act of 1921, itself "applies" (though at one remove, so to speak) section 17 of the Railway and Canal Traffic Act, 1888, in any relevant sense.

The repealed enactment here in question, namely, section 17 of the Railway and Canal Traffic Act, 1888, is an enactment providing for an appeal from the Railway and Canal Commission to the Court of Appeal, subject to certain limitations and restrictions set out in that section.

The question is what is the meaning of the words in section 8 (2) of the Act of 1949 "in so far as it applies any enact-"ment" taken in the context of the Act as a whole? In my view those words, considered in relation to the repealed enactment here in question mean, in effect, "any other enactment in so far as it "gives by reference to section 17 of the Act of 1888 any right of "appeal from the Railway and Canal Commission to the Court of Appeal." That, in my judgment, is what is meant by the words used by section 8 (2) when considered in their context and related to the relevant repealed enactment. It should be noted that the phrase is "in so far as it applies any enactment so "repealed," "applies" being used simpliciter without any explanation of the meaning to be attached to it, beyond what is afforded by the context in which it appears.

If I am right in the construction which I have placed on section 8 (2), it follows that section 26 of the Railways Act, 1921, has not ceased to have effect under that subsection, because it has not, within the meaning of that subsection, applied section 17 of the Act of 1888. Section 26 provides: "Section 17 of the "Railway and Canal Traffic Act, 1888, shall apply in respect of "appeals from the rates tribunal in like manner as it applies to "appeals from the Railway and Canal Commission." At first sight, a difficulty is raised by the circumstance that section 26 of the Railways Act itself makes use of the very word "apply" which is used in section 8 (2) of the Act of 1949. But although that might make it appear, on a first and uncritical reading of section 26, that section 26 must cease to have effect by virtue of subsection (2) of section 8 of the Act of 1949, that impression is, to my mind, dispelled by a further consideration of the language used. It is true that section 26 says that section 17 of the Act of 1888 "shall apply," but it goes on to qualify those words in a vital respect by adding the words "in respect of "appeals from the rates tribunal in like manner as it applies to "appeals from the Railway and Canal Commission." Thus although, in a sense, it is applying section 17, and expressly says that it is applying section 17, it is applying that section by no means in its existing form or for its existing purpose, but with an essential modification; it applies section 17, not for the purpose of giving a right of appeal from the Railway and Canal Commission to the Court of Appeal on any matter but for the purpose of giving a right of appeal to the Court of Appeal from a wholly different tribunal which had never existed before, namely, the Railway Rates Tribunal. In other words, I think that the real meaning and effect of section 26 is that it is creating a new right of appeal which never existed before from a newly constituted tribunal, and, for convenience of drafting, is expressing the terms of that right of appeal by reference to the provisions of section 17 of the Railway and Canal Traffic Act, 1888. Accordingly, notwithstanding the use of the word "apply" in section 26, I think that section 26 is not an enactment which "applies" section 17 of the Act of 1888, within the meaning of subsection (2) of section 8 of the Act of 1949. It is an enactment which creates a wholly new right of appeal to the Court of Appeal, and does so by borrowing (if I may use that expression) and adapting to that new purpose the language of section 17 of the Act of 1888.

If I am right in the view which I have endeavoured to express as to the meaning and effect of section 8 (2) of the Act of 1949 and section 26 of the Railways Act, 1921, a fortiori it follows that para. 5 of Sch. X to the Transport Act, 1947, is untouched by the provisions of subsection (2) of section 8 of the Act of 1949, for para. 5 can be said only to have applied section 17 of the Act of 1888 by reason of the reference it contains to section 26 of the Railways Act, 1921. As in the view which I take section 26 has not ceased to have effect by virtue of the provisions of section 8 (2) of the Act of 1949, the provisions of para. 5 of Sch. X to the Act of 1947 are clearly unaffected. Therefore, although I confess that the question is one on which I have felt considerable difficulty, I have come to the conclusion, with my Lord, that we should hold that there is here a right of appeal to this court.

As regards the substance of the appeal itself, I have very little to add to what my Lord has said. It is abundantly plain that sections 76 and 77 of the Act of 1947 empower, and indeed enjoin, the Transport Commission to prepare and submit schemes and, further, invest the Commission with an unfettered discretion to prepare and submit schemes from time to time as and when the Transport Commission may find it necessary or expedient in performance of their statutory duty. There is no doubt that so far as those sections are concerned, the Transport Commission would be perfectly entitled to submit a series of schemes dealing with the same subject-matter, even though each scheme might differ from its predecessor only in some comparatively minor respect. Subsection (2) of section 77 expressly provides that: "A charges "scheme may revoke or amend any previous charges scheme."

Accordingly, in my view the appeal must fail unless it can be said that the provisions of section 79 of the Act, which deals with applications for the alteration of charges schemes, should be construed as limiting and restricting in some way the powers of the Transport Commission under the preceding sections.

What section 79 does is to give certain persons a right, subject to certain restrictions, to apply to the Transport Tribunal for the alteration of a charges scheme. The persons who can make such an application include the Commission and, in addition, various other persons or bodies of persons. If that procedure is followed, regard must be had to the proviso to section 79 (1). [His Lordship read the proviso and continued:] It seems to me that the effect of section 79, so far as the Transport Commission are concerned, is this. The Transport Commission may, if so minded, apply for an alteration of a scheme under that section. If the Transport Commission choose to take that course, which may have certain advantages by way of restricting the scope of the ensuing inquiry, then their application will be subject to the restrictions stated in the proviso to section 79 (1) and, in particular, must comply with proviso (i) to the effect that the application cannot be entertained if less than 12 months have elapsed since the coming into force of the scheme. But I am at a loss to understand why it should be held that because the Commission have the option to proceed in that way they are obliged to proceed in that way, instead of adopting the alternative course of proceeding by way of application for confirmation of a new charges scheme. I cannot find anything in the Act which would justify the restriction of the Transport Commission's powers under sections 76 and 77 by reference to the provisions of section 79. I agree with my Lord that this appeal should be dismissed.

Romer L.J. I also agree. The question whether the right of appeal is still existing under the Act of 1949 appears to me to be a very short one of the construction of section 8 of that Act, to be resolved in the light of all relevant circumstances and the whole of the Act itself. Of course, it might be a matter for surprise that a right of appeal which was expressly conferred by the Act of 1947 should be taken away, and taken away only two years later by, as it were, a side-wind, by an Act which was directed to an essentially different subject-matter. But if that is in truth the result of the Act of 1949, the mere fact that the result is surprising must be regarded as irrelevant. The sole object of the Act of 1949, as ascertained from its long title and from its terms, was to abolish the Railway and Canal Commission and to deal with the consequences which might result from that abolition, and to clear up any residual remains of legislation which affected that moribund body. It is legitimate to note that neither the British Transport Commission nor the Transport Tribunal are referred to from first to last in that Act.

Then one comes to the last section, section 8, which, by subsection (2) provides: [His Lordship read it.] In my judgment, on the true construction of that subsection, the only enactments which cease to have effect are those which apply a repealed enactment to the Railway and Canal Commission. The Act of 1921, by section 26, applied section 17 of the Act of 1888, but it applied it to the Railway Rates Tribunal. Therefore, in my judgment, that section did not cease to have effect by reason of subsection (2) of section 8 of the Act of 1949. Similarly, para. 5 of Sch. X to the Act of 1947 applied section 26 of the Act of 1921 and, therefore, referentially applied also, it may be, section 17 of the Act of 1888. It did not, however, apply section 17 to the Railway and Canal Commission but applied it to the Transport Tribunal. I think that, on ordinary canons of construction, without having to resort to the special canons of construction in Maxwell to which we were referred, when we find here that the legislature has expressed itself elliptically, as I think it has, because it uses the word "applies," and provides expressly the subject-matter of the word, which is repealed enactments, but has not provided the object of the word, then that is a hiatus which the court is entitled to fill and, in doing that, to have regard to the purpose of the Act as a whole, to the history of the matter, and to the probabilities. In the light of those considerations, I have come to the conclusion that the word "applies" in section 8 (2) of the Act of 1949 has as its object the Railway and Canal Commission, which is the sole subject-matter of the Act of 1949, and has no other object. Therefore, I agree that this court had power to entertain this appeal and that appeals from the Transport Tribunal are still preserved.

On the main point, I will only say that it appears to me that a charges scheme for the purposes of the Act of 1947 is primarily, and in reality, a scheme which prescribes charges. The schemes are to prescribe charges on a sufficient scale to achieve an object, with regard to which the legislature was very solicitous, namely, sufficient charges to enable the Commission "to secure that "their revenue is not less than sufficient for making provision "for the meeting of charges properly chargeable to revenue "taking one year with another." I take that language from section 85 of the Act of 1947, which is an echo of section 3 (4). The essence of the scheme of 1952 is to be found in the charges which it prescribed. Those charges are to be found primarily in the schedule to the scheme, although there are references also in the body of the scheme to the same subject. The attack, as I understand it, on the present proposal is that, although it alters the schedules, it does not alter the structure or the body of the presently existing scheme and, therefore, must be regarded merely as an alteration and not as a new scheme in itself.

As I say, I think that the essence of the scheme of 1952 was the prescribing of charges. The body of the scheme itself operates almost entirely through the medium of the schedules and, in so far as it does not do that, it is mainly administrative machinery. Therefore, where it is found, as under this new proposed scheme, that the essence of the existing scheme, namely, the charges, is being completely altered, it seems to me difficult, if not impossible, to say that the new scheme is merely an alteration and falls short of being a new scheme. It is, in effect, altering the structure of the existing scheme in the most material possible respect, namely, in the revision and alteration of the entire scale of charges. I accordingly think that it is difficult to take any view other than that which my Lords have already expressed, namely, that this is a new scheme properly brought up and introduced by the Commission under section 76 and not merely an alteration of an existing scheme. Further, it is to be observed, as was pointed out in argument, that there is no provision in the Act making alterations and new schemes mutually exclusive. Indeed, subsection (1) of section 79 of the Act envisages the conversion of an "alteration," if it is of sufficient magnitude, into a new "scheme." That tends to show what I think is already apparent from the Act, that there is no element of mutual exclusion as between those two conceptions. Accordingly, I think that this scheme is in fact what it purports to be, a new scheme, and is proper subject-matter for consideration by the tribunal.

I, accordingly, agree that this appeal fails.

Appeal dismissed.

Solicitors: *J. G. Barr; M. H. B. Gilmour.*

E. D.

C. A.

1952
Dec. 18.

Evershed M.R., Denning and Romer L.JJ.

VAUGHAN *v.* VAUGHAN.

Husband and Wife—Matrimonial home—Desertion by husband—Wife told she could live there for life—Subsequent divorce of husband—Right to possession of house.

A husband was the owner of a house in which he lived with his wife as their matrimonial home until he left her on February 10, 1948. The wife continued to reside there, and in 1950 she obtained a decree of divorce against the husband on the ground of his adultery. After a time he brought proceedings for possession of the house, but she resisted this on the ground that he, when leaving the house, had told her that she could always live there. She claimed, therefore, that she had an irrevocable licence to live there during her life:—

Held, that after they had ceased to be husband and wife she could not justify her claim unless she could set up a contract. As it was, the statement originally made to her could, after the divorce, amount to no more than that she, as ex-wife, was entitled to remain in occupation as a bare licensee, and the licence was therefore revocable.

Per Evershed M.R.: I did not intend to lay down in *Foster* v. *Robinson* [1951] 1 K.B. 149; 66 T.L.R. (Pt. 2) 120; [1950] 2 All E.R. 342, that "where a promise has been made which is not "contractual in form or effect and that promise has in fact been "acted upon, then and without more a right is given to the promisee "to go on enjoying the subject-matter of the promise indefinitely."

Per Denning L.J.: The wife ought to have protected her position by applying for maintenance in the divorce proceedings before decree absolute, and should have come to an arrangement with her husband whereby he agreed not to turn her out except by an order of the court, she agreeing to accept a reduced sum for maintenance as long as she lived there.

Appeal from Judge Emlyn-Jones sitting at Birkenhead county court.

The plaintiff, John E. Vaughan, was the owner of 65 Grosvenor Road, Birkenhead, where he resided with his wife, the defendant Effie M. Vaughan, until he left her on February 10, 1948. The wife continued to reside there, and she obtained in 1949 a decree of judicial separation and in 1950 a decree of divorce on the ground of the husband's adultery.

The plaintiff afterwards brought proceedings to recover possession of the house, which were resisted by the defendant on the ground that when the plaintiff left the house he had told her that she could always live there. She claimed, therefore, that she had an irrevocable licence to live there during her life, and that in the grant to her of maintenance her residence in the house was taken into account.

The county court judge said that there could be no doubt that by an irrebuttable presumption of law a wife's licence to occupy the matrimonial home was irrevocable, *Bendall* v. *McWhirter*,[1] where, however, the marriage was still in being. Denning L.J. there said [2] that when a marriage came to an end the husband's former wife became a stranger to him and the presumption of law in her favour as the wife could no longer assist her. The wife, however, could rely on her contractual licence to the extent of the terms of the contract: *Errington* v. *Errington*.[3] In the present case he would hold that the plaintiff in 1948 licensed the defendant to live in the house always, but he could not see that any consideration moved from the defendant. But a contract supported by consideration was not essential, for although the defendant could not assert it as a cause of action, yet if the licensor sought to revoke the licence he would be restrained by the court from doing so: see the observation of Evershed M.R. in *Foster* v. *Robinson*.[4] He therefore dismissed these proceedings.

The plaintiff appealed.

F. D. Paterson for the plaintiff. This appeal turns on the position of the defendant, as the former wife of the plaintiff, occupying what was the matrimonial home after the marriage had been dissolved by a decree of divorce obtained by the defendant. On leaving the wife the husband allowed her to stay on in the matrimonial home, which belonged to him. When once the marriage was dissolved the defendant could only remain in occupation of the house as a mere licensee until the plaintiff, as the former husband, gave notice claiming possession. It would be different if she had been in possession under a contract for value.

[DENNING L.J. Even if there had been an agreement that the wife might stay on in the house for her life, that would amount to a post-nuptial settlement which could be dealt with by the Divorce Court.]

[EVERSHED M.R. This court has now to decide what should be done.]

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[1] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

[2] [1952] 2 Q.B. 466, 477.

[3] [1952] 1 K.B. 290; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149.

[4] [1951] 1 K.B. 149, 156; 66 T.L.R. (Pt. 2) 120; [1950] 2 All E.R. 342.

There is no obligation on the plaintiff, now that the marriage has ceased, to provide a residence for the former wife, and any obligation previously entered into had come to an end. The county court judge in deciding the contrary relied on *Errington* v. *Errington*,[5] where, however, there was a contractual licence, and on *Foster* v. *Robinson*,[6] in which the present Master of the Rolls was said to have made an observation showing there could be a binding licence without consideration.

[EVERSHED M.R. I certainly never intended to say that an arrangement entered into without consideration could be binding for the rest of the licensee's life.]

That being so, this appeal is really concluded in favour of the plaintiff.

W. G. Morgan for the defendant. It is submitted that the county court judge was right in regard to the inference he drew from statements of the present Master of the Rolls in *Foster* v. *Robinson*.[6] There the worker on a farm who was the tenant of a cottage became too old to work, and he was told that he could stay on in the cottage for the rest of his life without paying rent.

[EVERSHED M.R. The only question there arose after the workman's death, on a claim by his relative to remain on as tenant.]

In the present case it is contended that the plaintiff had made a statement allowing the defendant to remain on in his house for life. That is what the county court judge found on the evidence. He was impressed by what Denning L.J. said in *Errington* v. *Errington*[7] as to the obligation assumed by the husband to the wife. It is true that he spoke of the wife after the decree of divorce as becoming a stranger to the husband; but it is contended that none the less the defendant was entitled to the benefit of the plaintiff's gift, the more so as here the plaintiff was the matrimonial offender.

Even, however, if the court were to make an order in favour of the plaintiff, the defendant should not be ejected without giving her ample time to find elsewhere to live; otherwise a grave hardship would be inflicted on her after her occupation of the house for so many years.

F. D. Paterson in reply. If an order be made in favour of the plaintiff, he would be willing to wait for possession for four or even six months.

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[5] [1952] 1 K.B. 290; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149.

[6] [1951] 1 K.B. 149, 156; 66 T.L.R. (Pt. 2) 120; [1950] 2 All E.R. 342.

[7] [1952] 1 K.B. 290, 298.

EVERSHED M.R. This appeal raises, in a somewhat different form from that in which it has appeared in other recent cases, a problem concerning the occupation of the former matrimonial home by a former wife. I emphasize those last three words, "a "former wife," because it is important to note in this case that the marriage between the plaintiff and the defendant was dissolved (on the wife's petition) in June, 1950. Whatever may have been her rights as regards the matrimonial home before that date and so long as she remained the plaintiff's wife, from June, 1950, onwards any rights she can assert to remain in occupation of the former matrimonial home must rest on some other basis than that of her being the wife of the proprietor of those premises. [His Lordship stated the facts.]

By the present proceedings the husband, the plaintiff, seeks to obtain an order for possession of this dwelling-house. The county court judge refused to make the order, on the ground that the statement or promise made by the plaintiff to the defendant that she could always live there gave her a right, as a licensee, under a licence not revocable by the husband, to continue, and continue indefinitely, in the premises. That view was based on certain observations of my brother Denning in *Bendall* v. *McWhirter*,[1] and again in *Errington* v. *Errington*[2]; and in the course of the citations reference is also made to certain observations of mine in *Foster* v. *Robinson*,[3] to which I will return a little later.

In my judgment, and without trying to expound this subject to any greater degree than is necessary to decide this case, the wife cannot, now that the marriage has been dissolved, assert a continuing right to remain in occupation of this house unless she can at least set up some kind of contract. I do not need to pursue the question whether there should be a good consideration, but there must be something contractual—that is, a promise made, intended to have, and having, contractual effect. And when reference is made to this statement of the husband and regard is had to the time at which it was made, it seems to me impossible to suppose that what the husband said could have been intended by him, or understood by her, to have had any contractual basis or effect. Nothing, be it observed, was said about paying rent or rates, or what was to happen about repairs. Without more, it seems to me impossible to suppose that the husband intended to bind himself and that the wife regarded

[1] [1952] 2 Q.B. 466.
[2] [1952] 1 K.B. 290.
[3] [1951] 1 K.B. 149.

herself as entitled for the whole of her life, come what might, to remain in occupation of this house—I suppose upon terms that her husband would provide the rent and the rates and possibly provide for repairs also.

If that is right, then this promise or statement, and the subsequent conduct of the parties, which is consistent with the statement originally made, can amount to no more than that the ex-wife was entitled to remain in occupation as a bare licensee of her former husband as the proprietor of the premises. If that view is right, then the licence was clearly revocable in the eye of the law. Being revocable, and having been in fact revoked in this case, either by notice (which I understand was given in March of this year) or, failing all else, by the issue of a summons, the only question remaining is, what length of time ought to be allowed for the defendant to remove herself from the premises? For it is well settled that though a licence may be revoked the licensee is not instantaneously turned into a trespasser; he or she must be given time, reasonable in all the circumstances, in which to remove himself or herself and his or her belongings from the house in respect of which the licence operated. Upon that matter I have been much assisted by Mr. Paterson's suggestion; for he said that he would not object to four to six months being allowed to the wife. I take the larger period; and I think that though it is generous it is also not unreasonable, bearing in mind the length of time during which the defendant has in fact occupied this house.

One other thing only need I say before I suggest the form of order which should be made, and it is this. *Foster* v. *Robinson* [4] was a somewhat special case. It was one in which possession was sought not against the person who had, as it was said, become a licensee of the premises, but against his daughter. The headnote states the substance of the case thus: "Shortly "after the end of the first world war the plaintiff took over the "management of a farm and let a cottage near-by to a man who "worked on the farm at a rent of £3 5s. 0d. a half-year. Later "the plaintiff let the farm but the tenant of the cottage continued "to work till, in 1946, he became unfit to do so by reason of age "and infirmity. The plaintiff then told him that the existing "tenancy would cease but that he could live at the cottage rent "free till he died. The tenant accepted that offer and lived in "the cottage without paying rent till he died. The defendant,

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[4] [1951] 1 K.B. 149.

"his daughter, had lived in the cottage for nine years, and, on "her father's death, she took out letters of administration of his "estate and claimed to remain on at the cottage paying the old "rent. In proceedings by the plaintiff to recover possession, "*Held*, that the plaintiff was entitled to possession on the "grounds that the original tenancy had, as a result of the "arrangement in 1946, been surrendered by operation of law, ". . ." It follows from that citation that the court was not concerned with the question whether the former tenant could enforce the promise made to remain rent-free at the cottage. It is no doubt true that the pre-existing tenancy could only come to an end if its place were taken by something else. Certain findings of fact had been made by the county court judge. I observe from the judgment of Singleton L.J.[5] that the county court judge had found "that from May, 1946, until his death "the father was a licensee, paying no rent, but entitled to remain "in the cottage for the rest of his life."

The passage from my own judgment on which reliance was placed in the court below is this[6]: "Since the recent decision "in *Winter Garden Theatre (London), Ld.* v. *Millennium Productions Ld.*[7] I think that, although a licence of that kind "may, apart from the terms of the contract, be revoked, it may "now be taken that if the landlord, having made that arrangement, sought to revoke it, he would be restrained by the court "from doing so. Thus the result is arrived at that the tenant "was entitled as licensee to occupy the premises without charge "for the rest of his days, and he did so. I prefer that analysis "of the case." I did not intend to lay it down in that passage that, where a promise has been made which is not contractual in form or effect and that promise has in fact been acted upon, then and without more a right is given to the promisee to go on enjoying the subject-matter of the promise indefinitely. I have thought it right to make that explanation because I think that the county court judge in the present case may have thought that these words of mine did lead to such a conclusion; that though there was in the present case nothing contractual, still, the promise having been made, the ex-wife was entitled to assert it as a defence to any proceedings by her former husband to recover possession of his premises notwithstanding that he had in the meantime revoked the licence. I think, therefore, that in

[5] [1951] 1 K.B. 149, 160.

[6] Ibid. 156.

[7] [1948] A.C. 173; 63 T.L.R. 529; [1947] 2 All E.R. 331.

the present appeal the defence which was set up is not available to the wife, and I think that this appeal must be allowed.

Taking advantage of what Mr. Paterson has said, I think that the proper order will be that the defendant should be required to deliver up possession by June 24, 1953. That period will give her ample time to make such application as she thinks fit for a review of the order of maintenance at present operating. That she may well be entitled to obtain, for, as I understand, the sum which the plaintiff is now paying as maintenance has been calculated after making due allowance for the circumstance that the defendant was living at this house while her husband was paying not only the rent (if it is a leasehold property) but also the rates.

DENNING L.J. The county court judge seems to have thought that there was a contractual licence by the husband giving the wife the right to stay in the house for the rest of her life. If such a contractual licence were established, I would agree that the husband's claim in this action should be dismissed; but I would like to say that, in that event, the contractual licence would be a "post-nuptial settlement" within the jurisdiction of the Divorce Court, which could then decide whether or not the husband should get possession, and if so, on what terms. As I understand the law on this matter, when a husband makes a continuing provision for the future needs of his wife, in her character as a wife, which is still continuing when the marriage is dissolved, the provision is a "settlement" which can be brought before the court to see whether the provision should continue now that she has ceased to be a wife: see *Smith* v. *Smith* [8]; *Gunner* v. *Gunner* [9]; *Halpern* v. *Halpern*.[10]

The difficulty is to see that a contractual licence was established. To establish a contractual licence there must be a promise which is intended to be binding; and which is either supported by consideration, or is intended to be acted on and in fact acted on: see *Dillwyn* v. *Llewelyn* [11] and *Plimmer* v. *Wellington Corporation*.[12] In this case I cannot interpret the promise as one which was intended to create legal relations for life. It simply expressed in words the authority which the court would presume if nothing was said, namely, that the wife had authority to stay in the house in her capacity as a wife during the marriage. It is one of the familiar cases where the express authority is co-extensive with the presumed authority and, like it, is brought to an end by death or divorce: see *Bendall* v. *McWhirter.*[13]

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[8] (1945) 114 L.J.P. 30; 61 T.L.R. 331; [1945] 1 All E.R. 584.

[9] [1949] P. 77; 64 T.L.R. 513; [1948] 2 All E.R. 771.

[10] [1951] P. 204; [1951] 1 T.L.R. 461; [1951] 1 All E.R. 315.

[11] (1862) 4 De G.F. & J. 517.

[12] (1884) 9 App.Cas. 699.

The result is that the wife's right to stay in the house came to an end when she divorced her husband. She ought to have protected her position by taking steps in the divorce proceedings before decree absolute. She ought to have applied in those proceedings for maintenance, and then have come to an arrangement with her husband whereby he agreed not to turn her out of the house except by an order of the court, and she in return agreed to accept a reduced sum for maintenance so long as she lived in the house. Such an arrangement would undoubtedly be sanctioned by the Divorce Court on or after making the decree and thus become binding: *Bennett* v. *Bennett.*[14] The wife here unfortunately did not protect her position in that way. Upon the decree absolute she became simply a licensee with a revocable licence to stay in the house. But she could not be turned out at once. She was entitled to have a reasonable time in which to make her arrangements; and what is a reasonable time depends on all the circumstances of the case: see *Minister of Health* v. *Bellotti.*[15] Regard must therefore be had to the history of the marriage, to the fact that these two had been married for 21 years when the husband deserted her and later committed adultery, and also to the question whether any alternative accommodation was available for the wife. Any difficulty about fixing a reasonable time in this case was, however, solved when Mr. Paterson, for the husband, very fairly said that he was prepared to allow the wife another six months. That gives her time to go to the Divorce Court and get the maintenance increased up to a sum sufficient for her to live in comparable comfort somewhere else.

In these circumstances I agree that the appeal should be allowed and an order made for possession on June 24, 1953.

ROMER L.J. I agree. For a wife to establish a contractual right to continue to reside indefinitely in the former matrimonial home after the dissolution of the marriage, it seems to me that she would need to have much more material at her disposal

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[13] [1952] 2 Q.B. 466, 477, 478.

[14] [1952] 1 K.B. 249; [1952] 1 T.L.R. 400; [1952] 1 All E.R. 413.

[15] [1944] K.B. 298; 60 T.L.R. 228; [1944] 1 All E.R. 238.

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than the defendant has here, because all manner of things would have to be considered as incidental to that right. My Lord has mentioned the question of repairs and rates, which, of course, would be very material matters for consideration and agreement. Then there is the question whether the wife's right should continue after her remarriage or should cease upon such remarriage; the question whether she should have powers, and, if so, what powers, of subletting or assigning; and the further question whether, supposing she went abroad for three or four years, she would be entitled to resume possession on her return. Matters of that kind would have to be considered as preliminary to the granting of a right to remain in possession of the former home. It is not suggested that any of these matters were considered between the parties in the present case.

I am satisfied that the wife is not entitled to the right which she is claiming, and I am unable, therefore, to agree with the judge when he said that the plaintiff was precluded from asserting his legal right as owner. I think that the position is as my Lord has indicated, and that, subject to reasonable notice being given, the defendant must leave the premises.

Appeal allowed.

Solicitors: *Field, Roscoe & Co., for Berkson & Berkson, Birkenhead; George A. Herbert, for E. A. Simans, Birkenhead.*

H. C. G.

1953
Apr. 17.

Lord Goddard C.J., Lynskey and Parker JJ.

SYKES *v.* MILLINGTON.

Road Traffic—Goods vehicle—Licence—Owner of vehicle holding "B" licence limiting distance for carriage of goods—Vehicle and driver hired to holder of "C" licence permitting use for unlimited distance—Liability of owner for breach of conditions of "B" licence while on hire—Road and Rail Traffic Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *s.* 1 (3).

The respondent, a haulage contractor, was the holder of two "B" licences relating to three vehicles owned by him, limiting the use of the vehicles to within a given distance of a nearby railway station. On certain dates in 1952 one or other of the vehicles with drivers employed by the respondent was hired to a company for the carriage of the company's goods. During the period of hire the respondent continued to pay the drivers' wages and insurance contributions. The company was the holder of a "C" licence authorizing it to use any vehicle hired by it without limit on the distance within which the hired vehicle might be used. On each of the occasions that the vehicles were hired to the company goods were conveyed to places beyond the distance limited by the respondent's licences. On a charge under section 2 (3) of the Road and Rail Traffic Act, 1933, against the respondent of using the vehicles otherwise than in accordance with the conditions of his "B" licence, the justices held that whether or not the drivers were the servants of the respondent, they were at the material times the agents of the company within section 1 (3) of the Act of 1933; that the use of the lorries was authorized by the company's "C" licence; and that no offence had been committed:—

Held, that the drivers were at all times the servants of the respondent and could not at the same time be the agents of the company; accordingly the respondent was deemed to be the person by whom the vehicles were being used within section 1 (3) of the Act of 1933, and, therefore, he was in breach of the conditions of his "B" licence.

CASE STATED by Hampshire justices.

On October 24, 1952, at a court of summary jurisdiction sitting at Havant, eight informations were preferred by the appellant, Kenneth Tredgold Sykes, a traffic examiner, against the respondent, Henry Edmund Millington, charging him that on various dates during 1952 he unlawfully used certain vehicles for the carriage of goods for hire on behalf of Maurice Hill Construction Co. Ld. (hereinafter called "the company") otherwise than in accordance with the conditions imposed on his "B" carrier's licence, contrary to section 2 (3) of the Road and Rail Traffic Act, 1933.[1]

At the hearing of the informations the following facts were proved or admitted: The respondent carried on business as a haulage contractor and was the holder of two " B " licences, the first of which related to two vehicles owned by the respondent and limited their use to the carriage of milk, corn, cattle foods, furniture and effects within 75 miles and of other goods within 30 miles of Havant railway station. The second licence related to a third vehicle and contained conditions limiting its use to the carriage of milk, corn and cattle foods within 25 miles of Havant railway station.

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[1] Road and Rail Traffic Act, 1933, s. 1 (3): "When a goods vehicle is "being used on a road for the carriage "of goods, . . . the person whose "agent or servant the driver is, shall, "for the purposes of this Part of this "Act, be deemed to be the person by "whom the vehicle is being used. "(4) Where at any time goods are "carried in a goods vehicle, being a "vehicle which has been let on hire "by the person who at the time of "the carriage of the goods is within "the meaning of this Part of this "Act the user of the vehicle, the goods "shall be deemed to be carried by "that person for hire or reward."

S. 2 (3): "A limited carrier's "licence (in this Part of this Act "referred to as 'a B licence') shall "entitle the holder thereof to use the "authorized vehicles, as he thinks "fit from time to time, either for the "carriage of goods for or in connexion "with any trade or business carried "on by him, or, subject to any con- "ditions which the licensing autho- "rity, in the exercise of his discretion "to attach conditions to a B licence, "may attach to the licence, for the "carriage of goods for hire or "reward."

On each of the dates referred to in the informations, one or other of the vehicles was being used to convey building materials and plant on behalf of the company, who held a " C " licence for unlimited distances, beyond the distances permitted under the respondent's " B " licence. On each occasion the driver of the vehicle in question was either one Alderson or a son of the respondent. Alderson was in the employment of the respondent, who paid his wages and included such wages in his return. The respondent did not pay any regular wages to his son, but provided him with board and lodging and money in addition. He also paid in respect both of Alderson and his son the contributions due from an employer under the National Insurance Acts. In reply to a question by the bench the respondent assumed that if the driver misconducted himself when driving the lorry for the company he would be sent back to him to be discharged.

The company paid the respondent for the use of the vehicles and drivers, the amount being calculated either on a time basis or on a mileage basis. No wages were at any time paid to the drivers by the company, but the respondent kept a separate record of the wages attributable to the periods during which the vehicles were working for the company. These wages were taken into account by the respondent in making charges against the company. The records required under the Road and Rail Traffic Act, 1933, were kept in duplicate, one copy at the company's office and one at the respondent's.

For the appellant it was contended that as the vehicles were hired with the drivers by the company, and the drivers' wages and insurance stamps were paid by the respondent, the drivers were at all times his servants; that by virtue of section 1 (3) of the Act of 1933 the vehicles were at the material times used by him, and as the journeys were not in accordance with the conditions of the " B " licences, the respondent was guilty of the offences charged. It was contended for the respondent that as at the material times the drivers were under the orders of the company, they were the servants or, at any rate, the agents of the company within section 1 (3), and that the vehicles were being used by the company in accordance with its " C " licence, and no offence had been committed.

The justices being of opinion that on the material occasions the drivers were the agents of the company and, therefore, that the vehicles were being used by the company on journeys authorized by its " C " licence, dismissed the informations.

J. P. Ashworth for the appellant. The question here is: Whose servants were the drivers when the vehicles were hired to the company? Whosever servants they were is the user of the vehicles within section 1 (3) of the Act of 1933 and is liable if the distance permitted by his licence is exceeded.

[LORD GODDARD C.J. Why, if the company are permitted to use the vehicles beyond the 25 miles limit, is the person by whom the vehicles are hired out liable?]

Because that person is deemed to be the user if his servants are the drivers. It is conceded that no offence is committed if the drivers of the vehicles were the servants of the company, but applying the principle in *Mersey Docks and Harbour Board* v. *Coggins and Griffith (Liverpool) Ld.*[2] to the facts of the present case, there can be no question that the drivers were at all times in the employment of the respondent. If either of the drivers had been guilty of negligent driving the respondent would have been vicariously liable, and although it may be said that the test of vicarious liability should not be applied when considering a penal section, it is submitted that if there had been an accident to a third party while the vehicles were on hire the injured party would have no remedy against the company, but only against the respondent as employer of the drivers. The case where an employee is injured while on hire, as in *Garrard* v. *A. E. Southey & Co.*,[3] is distinguishable from the present case. If the drivers were, as is contended, the servants of the respondent, they could not at the same time be the agents of the company for the same work and the justices were wrong in so holding. [Counsel referred to *Hewitt* v. *Bonvin*.[4]]

R. I. Threlfall for the respondent. If the only question concerned the driving of the vehicles, it might be arguable whether the drivers were not the servants of the respondent, but the primary question for consideration under section 1 (3) is that of "use." The use of a vehicle was different from the mere act of driving, and here the control of the use of these vehicles had been wholly surrendered to the company.

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[2] [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345.

[3] [1952] 2 Q.B. 174; [1952] 1 T.L.R. 630; [1952] 1 All E.R. 597.

[4] [1940] 1 K.B. 188; 56 T.L.R. 43.

[LORD GODDARD C.J. You are saying that the drivers were the agents of the company. Where is the evidence to support that?]

The company could direct the driver to take the vehicle wherever they liked. He was not doing anything on the directions of the respondent.

[LORD GODDARD C.J. If the driver is the servant of his employer, how can he be the agent of the company at the same time?]

On the facts found there was nothing which would disentitle the justices from finding that the drivers were the servants of the company during the period of hiring. The finding only amounts to the fact that the general employers continue to pay the wages and have the power of dismissal. Neither of those factors would conclude the case against the respondent. The wording of section 1 (3) is against any construction which might lead to the conclusion that two persons were using the vehicles. The fundamental question is: for this particular carriage of goods, whose agent was the driver? The justices came to a correct conclusion.

LORD GODDARD C.J. [having stated the facts:] In view of the facts and applying the test laid down by the House of Lords in *Mersey Docks and Harbour Board* v. *Coggins and Griffith (Liverpool) Ld.*[1] it is clear that the drivers of these vehicles were at all times the servants of the respondent. One has only to take the ordinary case of a person hiring a car and a driver from a garage for a day. The person who has hired the car gives his orders to the driver where he wants to be driven. It is part of the contract between the garage proprietor and the driver that the driver will drive the person who has hired the car to where that person wants to go, and the person can no doubt say to the driver: "I want you to drive faster" or "I want you to drive "slower," but if the master had instructed the driver not to drive the car at more than 50 miles an hour, and the hirer told the driver to exceed that speed the driver could not be forced to do so.

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[1] [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345.

I can very well understand why the justices tried to find a way of dismissing these summonses, because the Act seems to me, speaking for myself, to be somewhat in the nature of a trap. One would hope that something may be done either by inserting terms in licences or giving notice to licence holders of this very curious result which seems to follow: A person holds a "C" licence which enables him to hire a lorry but not a driver, though everybody who hires a motor-vehicle normally expects to hire the vehicle plus the driver. The person who hires the motor-vehicle and a driver and makes use of the vehicle in a way which proves to be a contravention of the Act, commits no offence, but the person who hires out his vehicle to the holder of the "C" licence does.

It seems that the words of section 1 (3) are too strong. The material words are: "When a goods vehicle is being used on "a road for the carriage of goods . . . the person whose agent "or servant the driver is, shall, for the purposes of this Part of "this Act, be deemed to be the person by whom the vehicle "is being used." The only question is, therefore: were the persons who were driving these vehicles the agents or servants of the respondent? The justices would not decide whose servants they were, but decided that they were the agents of the company. With all respect to the justices, a man cannot be the servant of A and the agent of B in performing the same piece of work. He is either the servant of A or the servant of B. If my servant is driving my car as my servant, the mere fact that I have lent the car to a friend and told my driver to drive him, does not make the driver an agent. He remains my servant all the time. There might be certain circumstances in which a person driving the car would not be the servant because the relationship of master and servant had changed, but there was no evidence here on which the justices could find that the drivers were the servants of any person except the respondent. Therefore, they could not find that they were the agents of the company.

I should be glad if it could be made clear that although a person is given a "C" licence which enables him to hire a vehicle, he must take care not to hire it with a driver. The position is liable to give rise to misconception and injustice, but, as it is the case must go back to the justices with an intimation that the offences were proved.

LYNSKEY J. I agree. The effect of section 2 (3) of the Act of 1933, in the absence of any conditions, enables the holder of a " B " licence to carry his own goods or carry the goods of anybody else for hire or reward without limit as to goods or distance. Under the " B" licence granted to the respondent he was only allowed to use his vehicle for limited purposes and to carry goods for hire or reward within certain limits.

The result of the application of section 1 (4) to the facts of this case is that on the findings, the respondent lent his vehicle to the company and he was carrying their goods for hire or reward. The goods were not permitted to be carried for the distance under his licence, so that so far as he was concerned he was clearly in breach of his licence if he was using his vehicles for that purpose. It is said that he was not using them for that purpose, that although the facts come exactly within what is contemplated by section 1 (4), nevertheless the justices ought to have held, and did hold, that these vehicles were being used not by the respondent, but by the company. They did not decide whose servant was driving the lorry at the time. They said that the lorries were being driven by the agents of the company. So far as I can see from their findings and the facts, there is no evidence that the drivers were ever agents for the company in the driving of those vehicles. It is clear that the drivers were the servants of the respondent and, therefore, one is bound to hold that the vehicles were deemed to be used by him within section 1 (3), whether they were in fact being so used or not. There is no room in this case for the finding that either of the drivers could be treated as being a servant of the respondent for one purpose and agent of the company for another, because only one person is to be deemed to be using the vehicle, and apart from that, it seems to me that the driver, if he is the agent of anybody, is an agent for his employer. He is an agent for his employer in driving the goods for the purpose of earning the hire which the employer gets for the use of his (the driver's) services and the use of the vehicle.

The " C " licence issued in favour of the company does not purport to alter the conditions of the respondent's licence, and the respondent was in breach of his licence and had therefore committed an offence. The fact that a " C " licence exists is perhaps liable to cause confusion in the minds of those who have to operate these vehicles, and I agree with my Lord that it would be desirable to make the conditions of such a licence clear, and to make it clear that the holder, if he is going to use other people's vehicles for the purpose of taking advantage of the privileges granted to him, must be careful to hire a vehicle which is not by the terms of its licence limited or which receives express permission to do extended journeys or is a public service vehicle available for general hire. Unless he takes those steps, not he but the person whose vehicle he hires may get into trouble for being in breach of the conditions of the licence issued to that person. For those reasons, I would allow the appeal.

PARKER J. I agree with both judgments and have nothing to add.

Appeal allowed.

Solicitors: *Treasury Solicitor; Arthur S. Joseph & Cates for MacDonald, Jacobs & Oates, Portsmouth.*

J. D. P.

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4. —— *Leasehold property—Expiring tenancy—New lease—Business of builder and decorator—Shop—" Retail trade or business " —Shops Act*, 1950 (14 *Geo.* 6, *c.* 28), *s.* 74 (1) —*Leasehold Property (Temporary Provisions) Act*, 1951 (14 & 15 *Geo.* 6, *c.* 38), *s.* 10 (1) *and* (2); *s.* 20.

M. & F. Frawley Ld. *v.* The Ve-Ri-Best Co. Ld. - - - - - - **C.A. 318**

5. —— Rent limited by building licence. *See* Building.

6. —— *Rent restriction — Controlled premises—Payment of rent in excess of standard rent—Right of tenant to deduct excess from subsequent rent payments — Bankruptcy of landlord—Claim by trustee in bankruptcy to recover subsequent rent in full—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 14 (1).

Bradley-Hole *v.* Cusen - - **C.A. 300**

7. —— *Rent restriction—Covenant not to use the premises otherwise than " as a private " dwelling-house "—Tenant sublets top floor —Whether premises " lawfully sublet "—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 15 (3).

Dobbs *v.* Linford - - - **C.A. 48**

8. —— *Rent restriction—Lease provides for payment by tenant of £40 at end of tenancy towards redecoration—Assignee holds over as statutory tenant—Possession given up—Three months' notice to quit not given—Liability of statutory tenant to pay rent after giving up possession—Whether liability to pay £40 binding on statutory tenant—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 15 (1).

Boyer *v.* Warbey - - - **C.A. 234**

9. —— *Rent restriction — Possession — Closing order made by justices — Premises unfit for human habitation—Whether premises taken out of protection of Rent Acts by closing order—Public Health (London) Act*. 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 50), *Sch. V—Housing Act*, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 51), *s.* 156 (1) (*e*).

Marela Ld. *v.* Machorowski **C.A. 565**

10. —— *Rent restriction — Shop let with living quarters—Application of Rent Acts—Dominant user—Premium—Rent and Mortgage Interest Restrictions Act*, 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3 (3)—*Landlord and Tenant (Rent Control) Act*, 1949 (12 & 13 *Geo.* 6, *c.* 40), *s.* 2.

Whiteley *v.* Wilson - - - **C.A. 77**

11. —— *Rent restriction—Tenancy—Company's lease of flat to managing director for*

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seven years or earlier termination of managing directorship — Expiry of lease — Holding over by director — Statutory or contractual tenancy—Director's resignation—Correspondence between company and director about continued occupancy of flat — Company's willingness for former director to continue occupation as a " quarterly tenant " on terms that he should not be a controlled tenant—Licence or tenancy.
MURRAY BULL & CO. LD. *v.* MURRAY **McNair J. 211**

12. —— *Rent restriction—Tenant of London flat—House in the country—Infrequent visits to flat — Furniture left and caretaker installed —Whether occupied as a " home "—Rent and Mortgage Interest Restrictions (Amendment) Act*, 1933 (23 *&* 24 *Geo.* 5, *s.* 32), *s.* 3 (1).
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13. —— *Rent restriction—Widow of statutory tenant succeeding to statutory tenancy—Order for possession on terms that widow granted alternative accommodation by landlord—Alternative accommodation occupied by widow until her death—Widow's daughter entitled to succeed as statutory tenant of alternative accommodation—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 12 (1) (*g*), 15.
STRUTT *v.* PANTER - - - **C.A. 397**

14. —— *Yearly or weekly tenancy—Agreement for one year's tenancy at weekly rent—Holding over on payment of same weekly rent—Notice to quit on basis of weekly tenancy — Rebuttal of presumption of yearly tenancy.*
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2. —— *Public authority—Canadian soldier driving army truck on military duty—Accident —Injury to plaintiff—Claim against soldier—Action not begun within 12 months—Action not maintainable — Principle applicable to Commonwealth soldier serving in United Kingdom—Limitation Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 21 (1)—*Visiting Forces (British Commonwealth) Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 6), *s.* 2 (3) (*b*).
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3. ——. *See* GAS.

LOCAL GOVERNMENT—*Town and Country Planning — Compulsory purchase of land—Objection within prescribed time by local authority when not owner—Subsequent purchase by objecting local authority after time for objecting has elapsed but before public local inquiry—" Land which is the property " of a local authority "—Whether requirement that compulsory purchase order to be subjected to parliamentary procedure applicable—Acquisition of Land (Authorisation Procedure) Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 49), *Sch.* 1, *para.* 9.
MIDDLESEX COUNTY COUNCIL *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT - **C.A. 12**

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MINES AND MINERALS—*Breach of statutory duty by shot-firer—Mine-worker injured by explosion—Breach of statutory duty also by injured mine-worker—Causation—Liability of mine-owner at common law for negligence of shot-firer—General Regulations*, 1913 (*made under section* 86 *of the Coal Mines Act*, 1911), (*S.R. &* O. 1913, *No.* 748), *reg.* 1—*Explosives in Coal Mines Order*, 1934 (*made under section* 61 *of the Act of* 1911) (*S.R. & O.* 1934, *No.* 6), *art.* 2 (*e*) *and* (*h*).
ENGLAND *v.* NATIONAL COAL BOARD **C.A. 724**

2. —— *Gypsum mine—Fall of marl from roof—Caused by slickenside—Fatal accident to workman—Statutory duty of mine-owners " to " make secure the roof and sides of every . . working place " so far as shall be reasonably practicable—System of tapping—Whether props necessary—Metalliferous Mines Regulation Act*, 1872 (35 *&* 36 *Vict. c.* 77), *s.* 23—*Metalliferous Mines General Regulations*, 1938 (*S.R. & O. No.* 630), *para.* 7 (3).
MARSHALL *v.* GOTHAM CO. LD. - **C.A. 167**

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NATIONAL HEALTH SERVICE—*Hospital management committee — Negligence — Whether action maintainable against committee—National Health Service Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *ss.* 13, 72—*Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 265.
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NEGLIGENCE — Action against members' club. *See* PRACTICE AND PROCEDURE.

2. —— Hospital Management Committee. See NATIONAL HEALTH.

3. —— Liability of mine-owner for negligence of shot-firer. *See* MINES AND MINERALS.

4. —— *Shock—Injury to child—Negligence of driver of motor-vehicle—Liability to mother for shock — Extent of duty — Remoteness of damage—Area of potential danger.*
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5. —— Vicarious liability. *See* Husband and Wife.

PARLIAMENT—*Privilege—Communication to Member of Parliament—Communication in breach of court injunction—Unconnected with parliamentary proceedings—Jurisdiction of court to commit for contempt.*
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PENSION—*Claim by widow of deceased officer—Entitlement—Onus of proof—Death more than seven years after termination of service—Royal Warrant,* 1949 (*Cmd.* 7699), *arts.* 4 (2), 5 (1) (*a*) *and* (2).
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POISONS—*Sale of—Self-service system—Selection of articles by customer from shelves—Payment at cash desk in presence of qualified pharmacist—Legality—Pharmacy and Poisons Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 25), *s.* 18 (1) (*a*) (iii).

Contract—Offer and acceptance—Sale of goods—Self-service—Time of sale.
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PRACTICE AND PROCEDURE—*Competency of proceedings—Master and servant—Fatal accident to workman—Action by widow against employers under Fatal Accidents Acts—Letters of administration taken out in Eire but not in England—Claim by widow as administratrix—No representative capacity—Action a nullity—Fatal Accidents Act,* 1846 (9 *&* 10 *Vict. c.* 93), *ss.* 1, 2, 3—*Fatal Accidents Act,* 1864 (27 *&* 28 *Vict. c.* 95), *s.* 1.
Finnegan *v.* Cementation Co. Ld.
C.A. 688

2. —— *Parties—Members' club—Tort—Negligence—Two members "sued on their "own behalf and on behalf of all the other "members of the" club—Representation order—"Common interest"—Order restricted to members of club at date of tort—R.S.C., Ord.* 16, *r.* 9.
Campbell *v.* Thompson - **Pilcher J. 445**

3. —— *Summary procedure—Negligence—Personal injuries—Action under Fatal Accidents Acts—Procedure—Applicability of Ord.* 14—*Sufficiency of affidavit in support of order.*
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PROFIT—*Claim to pasture rights by prescription—Interruption of user—Protests by owner of dominant tenement followed by submission to interruption for more than one year—User as of right—Servient tenement occupied by sitting tenants during most of period of prescription—Common knowledge of grazing rights in locality—Onus of proof as to owner's knowledge and power to resist claim to private right—Prescription Act,* 1832 (2 *&* 3 *Will.* 4, *c.* 71), *ss.* 1, 4, 5.
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2. ——. *See* Justices—Practice.

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Perry *v.* Garner - - - **Divl.Ct. 335**

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ROAD TRAFFIC—*Goods vehicle—Licence—Owner of vehicle holding "B" licence limiting distance for carriage of goods—Vehicle and driver hired to holder of "C" licence permitting use for unlimited distance—Liability of owner for breach of conditions of "B" licence while on hire—Road and Rail Traffic Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *s.* 1 (3).
Sykes *v.* Millington - - **Divl.Ct. 770**

2. —— *Goods vehicle—Speed limit—Goods vehicle licensed under C licence—Unladen van used for carriage of passengers on road not in built-up area—No speed limit—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 10, *Sch. I—Road Traffic Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *Sch. I—Road and Rail Traffic Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *ss.* 8, 9—*Motor Vehicles* (*Variation of Speed Limit*) *Regulations,* 1950 (*S.I.* 1950, *No.* 1705). *r.* 2.
Woolley *v.* Moore - - **Divl.Ct. 43**

3. —— *Licensing—Land Rover constructed for the carriage of goods—Goods carried on attached trailer but not in vehicle itself—"Used for the conveyance of goods"—Goods vehicle—Vehicles* (*Excise*) *Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 89), *ss.* 5, 13 *and* 27.
James *v.* Davies - - - **Divl.Ct. 8**

4. —— *Motor vehicle—Third-party insurance—Permitting person to use uninsured vehicle—Permission not confined to that of owner of vehicle—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 35 (1).
Lloyd *v.* Singleton - - **Divl.Ct. 357**

SALE OF GOODS—*Sale by trade description—Mistake by buyers and sellers as to meaning of description—Delivery of goods in accordance with description—Effect of mutual mistake.*
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2. ——. *See* Contract; Poisons.

SHIPPING—*Dock—Statutory authority—Tug and towage — Shipping and unshipping of goods—Exclusion of privately owned tugs—Humber Commercial Railway and Dock Act*, 1901 (1 *Edw.* 7, *c. ccii*), *ss.* 66, 70—*Harbours, Docks, and Piers Clauses Act*, 1847 (10 *&* 11 *Vict. c.* 27), *s.* 33.
J. H. Pigott & Son *v.* Docks & Inland Waterways Executive - - **Sellers J. 338**

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STATUTE—Interpretation. *See* Transport.

TORT. *See* Husband and Wife.

TOWN AND COUNTRY PLANNING—*Enforcement notice under town planning scheme—Notice invalid as not stating date on which it comes into effect—No right of appeal against invalid notice—Invalidity a defence in proceedings to enforce notice—Town and Country Planning Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 23 (3) (4), 24 (1).
Mead *v.* Chelmsford Rural District Council - - - - - **Divl.Ct. 32**

2. ——. *See* Local Government.

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TRANSPORT — *Charges scheme —Alteration of existing scheme—Transport Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 49), *ss.* 76, 77, 78, 79.
Statute — Repeal — Repeal of other enactments to which it "applies"—Meaning—Right of appeal from Transport Tribunal—Railway and Canal Traffic Act, 1888 (51 *&* 52 *Vict. c.* 25), *s.* 17—*Railways Act* 1921 (11 *&* 12 *Geo.* 5, *c.* 55), *s.* 26—*Transport Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 49), *Sch. X, para.* 5—*Railway and Canal Commission (Abolition) Act*, 1949 (12 *&* 13 *Geo.* 6, *c.* 11), *s.* 8 (2).
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